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**An Evaluation of the American
Racketeer Influenced and Corrupt Organizations
Statute from a Canadian Perspective**

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The research for this document
was done by:

Jill McIntyre
Barrister & Solicitor

A. G. Henderson
Barrister & Solicitor
Ad Hoc Crown Counsel

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I. INTRODUCTION

"ORGANIZED CRIME? VERY SIMPLE. IT'S JUST A BUNCH OF PEOPLE
GETTING TOGETHER TO TAKE ALL THE MONEY THEY CAN FROM
ALL THE SUCKERS THEY CAN."

- Former mob member Vincent Teresa

Crimes are committed by rational and irrational people, and for a variety of motives, including financial gain, anger, revenge, political fanaticism, lust and jealousy. But the type of crime referred to as "organized crime" is committed by rational individuals solely for financial gain.

A modern criminal organization operates in a manner analogous to a modern business corporation. It is often possible to discern a clearly delineated chain of command, a well understood division of duties among members, rules of custom and procedure governing most facets of the individual members' daily affairs, and arrangements with other criminal organizations concerning operational boundaries and shares of the market. When an organization reaches this stage it poses a great threat to society. Removal of one or a few individuals from the structure does not affect day-to-day operations of a modern criminal organization any more than removal of two or three executives from a legitimate corporation affects its operations. Having taken on a life of its own, the organization perpetuates itself by seeking a profit through criminal activity. It is only through attacking the organization itself, rather than its component parts, that the structure can be collapsed and the criminal activity halted.

Existing Canadian criminal law has two major limitations in attempting to counteract organized criminal activity. First, it is not directly concerned with the profits of crime or the profit incentive at all. Deterrence, protection of the public and rehabilitation are the principles considered at sentencing. Imprisonment, fines, and probation are the mechanisms designed to

attain these goals. Within this framework, attempts to remove the profit from crime through sentencing have been sporadic and ineffective. Second, the existing law is concerned almost exclusively with single transactions committed by individual offenders. This works well enough for so-called "street crimes", which tend to be spontaneous or poorly planned, violent, drug or alcohol related, and not particularly successful from a financial point of view.¹ But offences committed by criminal organizations are different in kind and effect. They are well planned and executed, less easily detected and proven, and generally much more lucrative than street crimes. The perpetrators have made a conscious and rational decision to accept the relatively low risk of detection and conviction in exchange for the high potential profit.

This report deals with organized criminal activity, or "enterprise" crime. As used in this paper, "enterprise" crime includes all types of criminal activity that are part of an ongoing arrangement between persons for the purpose of profit. It also includes the use of an existing organization to perpetrate or disguise criminal activities. Use of the term "organized crime" is avoided out of a desire not to restrict the reader's focus to a narrow view of the type of crime syndicate portrayed in the media. That type of syndicate is included in the notion of enterprise crime, but so is a group of corrupt businessmen who use illegal methods to further their legitimate interests, as well as a corrupt labour union, and a group of individuals who organize themselves to import narcotics.

It is the thesis of this paper that enterprise crimes are inherently different from other types of criminal activity and can and should be looked at as a separate phenomenon.² An innovative piece of recent American legislation, the

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1. Some idea of the less than lucrative nature of most "street" crime can be deduced from the fact that, in Ontario, approximately 80% of all accused persons qualify for legal aid as they are unable to afford a lawyer: letter dated April 2, 1979, from George D. Finlayson, Treasurer, Law Society of Upper Canada, and John D. Bowlby, Chairman, Legal Aid Committee.
 2. The types of crimes favoured by enterprises are either victimless or complex, making criminal activity less easily detected and proven. Successful criminal enterprises can amass large reserves of illegal profits which can further assist them in their activities: politicians

Racketeer Influenced and Corrupt Organizations Statute³, will be examined in this context. This Statute, in addition to making the profits of crime forfeitable, provides a way of focusing criminal and civil proceedings upon the enterprise as a whole, rather than on the isolated acts or transactions which the enterprise carries out.

The purpose of this report is to examine Title IX of the American Organized Crime Control Act of 1970, the Racketeer Influenced and Corrupt Organizations Statute ("R.I.C.O.") and to assess the desirability of incorporating provisions similar to those contained in the R.I.C.O. Statute into Canadian law.

The study was undertaken in four parts: first, the extent of enterprise crime found in this country was examined; second, consideration was given to existing provisions in Canadian law that could be used against that type of criminal activity in ways similar to the R.I.C.O. Statute; third, an analysis of the R.I.C.O. Statute was undertaken in order to determine its effectiveness and to identify problems in its operation; and finally, an assessment was made and recommendations formulated.

Certain portions of our research, such as the legal interpretation of the R.I.C.O. Statute, were well documented and the information was readily available. In other areas, such as determining the extent of enterprise crime in Canada, hard information was much less certain and difficult to obtain. We read police files and spoke with a substantial number of police officers engaged in the intelligence gathering process,⁴ but frequently the sensitive

2. (cont.) and public servants can be bribed, legitimate fronts set up, or cash reserves used to finance sophisticated criminal acts such as truck hijacking or large-scale narcotic importation. The sophistication and the profitability of the crimes committed by criminal organizations, and the ability of the criminal enterprise to continue its activities after several members of the enterprise are removed from it, differentiate enterprise crimes from individual street crimes in a fundamental way.

3. 18 U.S.C. 1961-1968.

4. A complete list of persons and organizations contacted is appended hereto.

nature of the information involved imposed constraints on its use which, to say the least, increased the difficulty of discussing the subject. In addition, there were many areas where nothing more certain could be found than the educated guesses of senior police officers.

In assessing the desirability of the R.I.C.O. legislation, questions of the cost of investigation and prosecution of R.I.C.O. cases fell outside our mandate. Clearly, questions of cost are both relevant and important, as worthwhile prosecutions under the R.I.C.O. legislation are lengthy and complex. Their investigation and prosecution will demand a substantial commitment in terms of manpower, and the investigators and prosecutors must be among the most senior available.

The reader is asked to keep the above provisos in mind when reading the balance of the report.

II. NATURE AND EXTENT OF ENTERPRISE CRIME IN CANADA

"It is organized crime's accumulation of money, not the individual transactions by which the money is accumulated, that has a great and threatening impact on America. A quarter in a jukebox means nothing and results in nothing. But millions of quarters in thousands of jukeboxes can provide both a strong motive for murder and a means to commit murder with impunity. Organized crime exists by virtue of the power it purchases with its money. The millions of dollars it can invest in narcotics or use for layoff money give it power over the lives of thousands of people and over the quality of life in whole neighborhoods. The millions of dollars it can throw into the legitimate economic system give it power to manipulate the price of retail merchandise, to determine whether entire industries are union or non-union, to make it easier or harder for businessmen to continue in business."¹

Few authorities can agree on a precise definition of "organized crime." Since a definition is unnecessary to our present purpose, we will refrain from offering one and use the phrase "criminal enterprise" instead.²

A criminal enterprise can be an ethnically based crime syndicate, a small group of people conspiring together, or a corruptly-used formal organization. There are four essentials included in the concept:

- 1) Planning and organization of criminal activity;
- 2) A succession of criminal acts, and some degree of continuity of organization;
- 3) Rational behavior, i.e., a conscious acceptance of the risks inherent in the activity; and
- 4) The pursuit of financial gain.³

1. Task Force on Organized Crime, The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime, Annotations and Consultants' Papers, U.S. Government Printing Office, Washington, D.C. 1967, page 2. Footnotes omitted.

2. For a good analysis of the development of the concept of criminal enterprise, see Burchfiel, Kenneth J., "The Economic Organizations of Crime: A study of the Development of Criminal Enterprise", Criminal Law Quarterly, Vol. 20, (1977-78), 478-512.

3. The researchers considered extending the concept to include acts of

The concept of criminal enterprise is diametrically opposed to what is loosely referred to as "street crime." Street crime is visible, enterprise crime is not. Street crime is often desperate, drug or alcohol related, and usually spontaneous or poorly planned. Enterprise crimes are well organized, with risks carefully assessed and contingencies planned for. Street crimes are normally unprofitable over time, whereas substantial fortunes can be made by engaging in enterprise crime.

That criminal enterprises flourish and profit in today's society can hardly be questioned. What can be questioned is the extent to which they do so, and there is no definitive answer to this. The only way the extent of criminal activity and its profits can be measured is by educated guesswork. Experienced police officers become aware of many instances of criminal conduct that never come to the attention of the courts due to lack of evidence. Random checking by such people as Customs officers and income tax investigators allow statistical estimates to be compiled. Police intelligence data is assembled on "known" criminals, their lifestyles and assets. In general, although intelligence information of all types is gathered assiduously, the resulting "facts" and statistics are necessarily speculative. However, while police sources may disagree on the magnitude of certain types of criminal activity, there is widespread recognition of the existence of the types of criminal activity described herein.

In determining the extent of criminal activity in this country, a question arises as to how closely criminal enterprises in this country resemble those in the United States. It is noted that the economic and social systems of the United States that have provided a fertile breeding ground for organized criminal gangs are closely comparable to those in this country. There is no reason to believe, for example, that Canadians are less eager consumers of illicit narcotics, prostitution, or gambling services. Moreover, enterprise crime has no concern over, or respect for, international boundaries. Indeed,

3. (cont.)

terrorism and political fanaticism, but rejected the idea as falling outside the scope of the report.

it would appear that both the Mafia and certain motorcycle gangs regard Canada as the ideal place for a "branch plant" operation, just as many large U.S. corporations have established Canadian subsidiaries over the years. Toronto, Hamilton and Montreal are firmly linked to the American Mafia structure, and American motorcycle gangs have well established member clubs in many Canadian provinces.

This portion of the paper examines briefly the extent in Canada of various types of enterprise crimes. In choosing the areas of criminal activity to examine, the researchers chose ones for which the R.I.C.O. Statute was designed or for which it has been extensively used:

1. Narcotics;
2. Loansharking;
3. Gambling;
4. Labour Corruption;
5. Criminal gangs, such as motorcycle gangs;
6. "White collar" or commercial crime;
7. "Laundering" of money and infiltration of legitimate business.

Each of these areas has distinct characteristics that make the novel provisions of the R.I.C.O. Statute especially useful in prosecuting that area of criminal activity. At a later stage in this paper, the value of the R.I.C.O. Statute in prosecuting these various criminal activities will be discussed.

(A) NARCOTICS: THEIR MANUFACTURE, IMPORTATION AND DISTRIBUTION

A former narcotics courier, now a police informer, recently claimed that he made \$1 million a year transporting heroin for a Toronto-based international heroin ring.⁴ Large-scale narcotics trafficking and importing is a lucrative business. For example, it has been estimated by police sources that nearly \$1.5 million per day is spent in this country by heroin users to purchase that

4. "Huge drug ring smashed", Toronto Star, July 27, 1979, p. A12.

narcotic.⁵ (The illicit heroin trade is said to be the "fifth largest industry" in British Columbia.⁶) The use of cocaine is increasing. A political scientist estimates that there are more than 100,000 Canadian users of this expensive narcotic⁷ and a newspaper article claims that a kilogram of cocaine that could be purchased wholesale in Colombia or Peru for \$75,000 to \$100,000 could be worth up to \$2.2 million when distributed "on the street" after dilution.⁸ Marijuana, too, represents the potential for vast profits, as there may be 2.5 million regular marijuana users in Canada.⁹ Two recent seizures of marijuana on the west coast of Canada in 1978 and 1979 had a total street value of over \$128 million.¹⁰ A more recent seizure on the east coast of Canada had an estimated value of \$50 million.¹¹

In the United States, federal estimates of illegal drug profits made in 1978 range from \$44 billion to \$63 billion, about half of the \$120 billion federal agents estimate was collected from all illegal activities of organized crime.¹² Newspapers in this country tell the story of how lucrative the trade can be: In 1978, police in Toronto seized more than \$2.2 million worth of

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5. Criminal Intelligence Service Canada, Audiovisual presentation on Organized Crime in Canada, 1979.
 6. Ministry of Attorney General, Co-ordinated Law Enforcement Unit, "A Proposal for Reducing Drug Trafficking and Abuse in British Columbia", March 1977, page 38 (unpublished).
 7. "Expert says Colombia gets \$8 billion a year from drugs", Calgary Herald, 15 August 1979.
 8. Heller, Liane, "How Operation Gotcha Shook the Coke Crowd", Toronto Star, Sunday Star, 30 March 1980, p. A12.
 9. Op. cit. note 7.
 10. Op. cit. note 5.
 11. "Nine Held in \$50m Drug Haul", Vancouver Province, June 2, 1980.
 12. "Senators Get the Feel of Big Drug Money", San Francisco Chronicle, 8 December 1979.

cocaine and laid more than 250 criminal charges after one investigation;¹³ Montreal police seized \$700,000 in cash and hashish worth an estimated \$9 million early this year,¹⁴ and two months later they raided a drug factory that manufactured phencyclidine (PCP), seizing about 10 pounds of the drug that they claim could be sold on the street for \$32 million;¹⁵ Edmonton, Calgary and R.C.M.P. officers recently laid successful charges of conspiracy to traffic in heroin against several individuals. The value of the heroin in that case was estimated to be \$6.2 million.¹⁶ The list could go on. Yet police sources in Canada estimate that narcotics seized in investigations represent less than 5 per cent of what is actually imported.¹⁷

It should not be thought that most of the individuals involved in narcotics trafficking are being convicted and imprisoned. Sophisticated importation, manufacture and distribution schemes necessitate large financial resources and a considerable degree of experience in the field.¹⁸ Persons who rise to the

13. Op. cit. note 8.

14. Collister, Eddie, "\$9 Million in Hashish Seized in Warehouse", The Montreal Gazette, 2 February 1980.

15. "Police Raid Nets \$32 Million Haul of Lethal Drug", The Montreal Gazette, 29 April 1980.

16. Lee, Gordon, "Four Jailed on Heroin Charge", Calgary Herald, 6 June 1980.

17. Criminal Intelligence Service Canada, op. cit. note 5.

18. See, for example: Regina v. Bengert et al (Aug. 3, 1979) unreported, Supreme Court of British Columbia, Van. #CC780556.

The accused were convicted of conspiracy to traffic in cocaine. The judge found that "The organization had hundreds of thousands of dollars available for purposes of buying cocaine in South America...The last shipment by the accused...was the largest seizure of cocaine ever made in Canada, 19.6 pounds. This one shipment, once cut and distributed, could be sold on the street for anywhere from one million to three and one-half million dollars"...(Reasons for judgment, Page 2). Robertson and Zamai, the leaders of the organization, were sentenced to 20 years' imprisonment and a \$50,000 fine.

top of these criminal organizations are able to insulate themselves, through the use of intermediaries, from any direct contact with the narcotic involved. This necessitates lengthy, complex and costly investigations in order to gather sufficient evidence for conviction.

During the course of their investigations, it is usual for police to be aware of continuing criminal activity resulting in great profits to those under surveillance. However, the investigation cannot be concluded until sufficient admissible evidence for a conviction has been obtained. During this time, substantial profits may pass through the hands of the perpetrators. For example, a recent British Columbia investigation (which resulted in charges of conspiracy to traffic in heroin and importation) took three years to investigate. It was alleged by police that the organization had netted "up to \$37 million" from the importation and sale of Mexican brown heroin.¹⁹ The individual at the top of the organization, like others in his position, showed signs of a wealthy lifestyle. A senior member of the R.C.M.P. in British Columbia estimates that approximately 70 per cent of the illicit income investigated by them under the Income Tax Act (discussed in more detail in Part IV of this report) is obtained through drug trafficking. In British Columbia in 1979, these investigations showed the criminal subjects of their attention to be collectively liable for income tax assessments of close to \$4 million. For the first six months of 1980, the comparable figure is \$3 million.²⁰

Our criminal justice system does not provide any adequate means of confiscating the immense profits made by drug importers and traffickers. The limited forfeiture provisions in the Narcotic Control Act are of little use in

19. Smith, Dave, "Luxury Estate in Ruins as Heroin Smuggling Career Snuffed Out," The Vancouver Sun, 6 October 1979.

20. The Income Tax program is described herein, Chapter IV(A). These figures were received in a private conversation with Staff Sgt. Ernie Brydon, N.C.O. in charge of Special Projects with the Royal Canadian Mounted Police, Commercial Crime Section, Vancouver, B.C.

this regard.²¹ The need to focus criminal proceedings on individual transactions (or, in the case of a conspiracy, on a single agreement) means that, after a complex investigation, no more than a small part of the whole picture will be presented in court.²² Since none of the drug offences requires proof of an exchange of funds, the flow of money is rarely demonstrated. This, in turn, serves to under-emphasize the business aspects of drug trafficking. At the time of sentencing, usually very little additional evidence is available to the Crown concerning the wealth of the convicted persons, and monetary penalties tend to be insubstantial.

We do not wish to imply that sentences imposed upon narcotics importers and traffickers have been lenient; the opposite is the case. There is a minimum sentence of seven years' imprisonment for importing a narcotic, and it is not uncommon to see 20-year sentences imposed upon the heads of sophisticated operations. But 20 years (or even life imprisonment) can be reduced to seven years under existing parole regulations with day parole available two years earlier than that.²³ And some top-level drug dealers may have amassed many millions of dollars before being successfully prosecuted.²⁴ This money can be used by others in the organization to continue their illegal activities, or it can be hidden to await the convict's release from prison.

21. Narcotics Control Act, R.S.C. 1970, c. N-1.

See discussion on the use of the forfeiture provisions of this Act in Part III (E) of this report.

22. See discussion of the Rule against proof of multiple conspiracies in Part III (G) of this report.

23. Telephone conversation with Janet Champion, Parole Officer with the National Parole Board, Victoria, B.C., Office.

24. For example, a major American drug dealer, Jaime Alonzo Arango-Avila, recently pleaded guilty to narcotics violations and tax evasion charges that he had failed to report more than \$13 million in income from his narcotics activities. Rawitch, Robert, "Drug Dealer Pleads Guilty in Tax Case", Los Angeles Times, 19 October, 1979.

(B) LOANSHARKING

Loansharking, or shylocking²⁵ as it is sometimes called, is the lending of money at usurious rates of interest.²⁶ Because the debt is legally unenforceable²⁷, coercive techniques will be used to collect the debt if necessary.²⁸ What is "usurious" depends on the market rate of interest, but generally the rate associated with the typical loansharking transaction is so far above the market rate that it is immediately identifiable as usurious. Rates such as 20 per cent per week, calculated on a compounding basis, are not uncommon.²⁹

25. "In 1597, Shakespeare depicted the unsavoury creditor in the person of Shylock, who demanded a pound of flesh of a desperate borrower as collateral for his loan. Slurred by illiterate street hoodlums in the early part of this century, 'shylock' became 'shark'. Thus was born the word 'loanshark', denoting the lender who demands the borrower's body as security for repayment."

Source: Goldstock, Ronald, and Coenen, Dan T., Perspectives on the Investigation and Prosecution of Organized Crime--Extortionate and Usurious Credit Transactions: Background Materials, Cornell Institute on Organized Crime, 1978 Summer Seminar Program (Ithaca, N.Y., 1978), p. 1. Footnotes omitted.

26. This is not to be taken as a legal definition. There is no accepted definition of the term. In common usage, the concept embodies both the charging of exorbitant interest rates and the use of threats and violence in collecting the debts. (See Goldstock and Coenen, pp. 1-2.) However, because the threats are often not explicit, it is difficult to define the term precisely.

27. Consumer or trade practices legislation in most provinces would make the debt unenforceable. See also the Federal Small Loans Act, R.S.C. 1970, c. S-11.

28. Some American statutes have incorporated the concept of "understanding" a coercive element, to get around the problem of implicit threats. See Goldstock and Coenen, pp. 63-68.

29. A rate of 20% per week, compounded, is referred to as a "six-for-five" loan, denoting that for every \$5.00 borrowed, \$6.00 are repayable at the end of the week. The cost of such a debt can be seen by analyzing a "six-for-five", or a "vig" loan, requiring payment of a weekly interest charge with the principal repayable in lump sum: on a loan of \$500.00, after eight weeks the borrower will have paid \$800.00. He will still owe the original debt.

In Canada, loansharking is one of enterprise crime's most lucrative activities.³⁰ On one hundred dollars, a loanshark can expect to make one thousand dollars in a year.³¹ Montreal Urban Community Police estimated loansharking profits at over \$40 million in that city alone in 1976.³² R.C.M.P. sources state that in the Lower Mainland of British Columbia there are individuals with at least \$3-4 million on the street for the purposes of loansharking.³³

The loanshark lends to individuals who are too poor a risk to attain financing through normal lending institutions. Defaulting individuals may be forced into criminal activities in order to repay the loan,³⁴ or a more ruthless scheme may be devised.³⁵ The loanshark also lends to the legitimate businessman. Over-extended through commercial lending institutions, or in

29 (cont.)

For a description of a Canadian loansharking operation run by the Dubois gang, see Quebec Police Commission, Report of the Commission of Inquiry on Organized Crime and Recommendations, The Fight Against Organized Crime in Quebec, (Editeur Officiel du Quebec, 1976), pp. 142-165.

30. Criminal Intelligence Service Canada, op. cit. note 5.

31. Ibid. The Quebec Crime Commission states that \$70,000 loaned at 20% per month would amount to half a million dollars in less than a year. Quebec Police Commission, op. cit., note 29, p. 144.

32. Criminal Intelligence Service Canada, op. cit. note 5.

33. Private conversation with senior officer of the Royal Canadian Mounted Police, Commercial Crime Section, Vancouver, B.C..

34. For examples, see Goldstock and Coenen, p. 37. See also United States v. Zito, 467 F. 2d. 1401 (2d Cir. 1972).

35. "One man who borrowed \$1,900, paid \$14,000, and still owed \$5,000 in late fees and penalties. The victim, hopelessly in arrears on a staggering debt, was offered a solution by the loanshark. Following the accidental electrocution of the borrower's son in a railroad yard, the loanshark suggested that the borrower sue the property owner; damages recovered in the suit were assigned to the shark." Goldstock and Coenen, p. 36. Footnotes omitted.

need of emergency financing³⁶, a default for the businessman may mean the loss of his entire business.³⁷ Alternatively, he may be forced into an arson or bankruptcy fraud.³⁸ The loanshark also provides financing for criminals.³⁹ Solly Levine and William Obront, the infamous money-movers for many organized crime figures in Canada, were found by the Quebec Crime Commission to have "been the source of financing for many criminals and other individuals engaged in illegal underworld activities."⁴⁰

Until very recently, Canadian legislation was inadequate to deal with loansharking. But recent changes to the Criminal Code⁴¹ will remedy the situation to a great extent. Prior to the enactment of Bill C-44, discussed below, a Criminal Code prosecution could be brought only if the transaction

36. See Goldstock and Coenen, pp. 39-41.

37. Loanshark "foreclosures" are a common method of organized crime infiltration of legitimate business. They are dealt with under section 1962(b) of the "R.I.C.O." Statute and explained at a later stage in this paper.

38. See Goldstock and Coenen, p. 37 and pp. 52-56.

39. Joseph Valachi in explaining his technique for choosing among potential customers, stated a preference for lending to fellow criminals: "At one time I had around 150 regular customers. I got rid of the ones that were headaches and kept the ones that were no trouble--bookmakers, numbers runners, guys in illegal stuff." Goldstock and Coenen, p. 37.

40. Quebec Police Commission, Report of the Commission of Inquiry on Organized Crime and Recommendations: Organized Crime and the World of Business, (Editeur Officiel du Quebec, 1977) p. 117. The Crime Commission hypothesized that a "quite substantial" portion of the \$84,000,000 projected to have come through Obront's hands between 1962 and 1975 was attributable to lending activities.

41. Criminal Code, R.S.C. 1953-54, c. 5, was amended by Bill C-44 (1st Session, 32nd Parliament, 29 Elizabeth II, 1980), "An Act to amend the Small Loans Act and to provide for its repeal and to amend the Criminal Code."

was accompanied by violence or an explicit threat of violence.⁴² Where coercion was more subtle, or where it was merely "understood" as an integral part of the transaction (as is often the case) the only statutes that could apply to the transaction were regulatory statutes such as the Small Loans Act.⁴³

The researchers presume that the enactment of Bill C-44 was prompted, at least in part, by a long-standing campaign on the part of the Canadian Association of Chiefs of Police.⁴⁴ The Bill, which has been passed by the House of

42. Section 305(1) of the Criminal Code reads as follows:

"Every one who, without reasonable justification or excuse and with intent to extort or gain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done, is guilty of an indictable offence and is liable to imprisonment for fourteen years."

43. R.S.C. 1970, S-11. Each province has applicable legislation as well. For example, in British Columbia see, Trade Practices Act, R.S.B.C. 1979, c. 406, Consumer Protection Act, 1967, R.S.B.C. 1979, c. 64, and Consumer Protection Act, R.S.B.C. 1979, c. 65.

The main problem with using regulatory statutes in this area is that the loanshark is treated the same as a legitimate lender who uses deceptive practices or misleads about the cost of a loan. Penalties tend to be very light, although this is not always the case. Mr. Jean Pierre Bonin, Chief Prosecutor for the city of Montreal, told us that, in Quebec, it would not be unusual for a person who was convicted of several violations of the Small Loans Act to be sentenced to consecutive prison terms. This reflects the "public education" function served by the Crime Commission in that province.

44. In 1979, the Canadian Association of Chiefs of Police made the following resolution:

"BE IT RESOLVED that the Canadian Association of Chiefs of Police recommends to the federal government that provision be made for a new Section 305(3) in the Criminal Code of Canada, to state:

'Everyone who receives a credit charge at a usurious credit charge rate or enters into an agreement or arrangement to receive a credit charge at a usurious credit charge rate, is guilty of an offence.' and may receive up to five years imprisonment. A usurious credit charge rate is a rate that exceeds sixty percent per annum on the credit actually advanced pursuant to any agreement or arrangement."

Commons but not yet been proclaimed⁴⁵, makes an offence of agreeing to receive, or receiving, interest at a rate greater than 60% per annum.⁴⁶ The new offence may be prosecuted summarily or by indictment, but the consent of the Attorney General must be obtained before proceeding either way.⁴⁷

The proclamation of Bill C-44 is eagerly awaited by the law enforcement community, and it remains to be seen how effective it will be in dealing with loansharking activities. But even it is effective, there will still be room for legislative improvement in this area. One facet of loansharking that is not dealt with by Bill C-44, for example, is the taking over of legitimate businesses by loansharks.⁴⁸ Loansharking activities that result in the takeover of a business might well result in a fine and possible jail sentence, but the loanshark may still be allowed to retain the business after conviction.

44.(cont.)

See also "Up on the Hill..., A Brief by the Canadian Association of Chiefs of Police concerning The Borrowers and Depositors Protection Act, Bill C-16", Canadian Police Chief, Vol. 66, No. 2, April, 1977.

45. As of August, 1980.

46. Section 9 of Bill C-44 incorporates the following into the Criminal Code immediately after section 305:

"Criminal Interest Rate

305.1(1) Notwithstanding any Act of the Parliament of Canada, every one who

(a) enters into an agreement or arrangement to receive interest at a criminal rate, or

(b) receives a payment or partial payment of interest at a criminal rate, is guilty of

(c) an indictable offence and is liable to imprisonment for five years, or

(d) an offence punishable on summary conviction and is liable to a fine of not more than twenty-five thousand dollars or to imprisonment for six months or to both."

"criminal rate" is defined as a rate exceeding 60 percent per annum.

47. See subsection (7) of the amended section.

48. Section 1962(b) of the R.I.C.O. Statute is discussed in Part V of this report.

(C) GAMBLING

In the United States, gambling is estimated almost unanimously by law enforcement officials to be the greatest source of revenue for organized crime in that country. Estimates ten years ago placed the annual take from gambling in the United States anywhere from \$7 billion to \$50 billion annually.⁴⁹

In Canada, millions of dollars are bet illegally each week through bookmakers. In Montreal, a 1975 investigation of one bookmaker showed a "handle" of nearly \$900,000 in only 15 days.⁵⁰ In the Toronto area, police estimate that there are at least 600 active bookmakers, with individual weekly takes varying between \$1,000 and \$40,000.⁵¹ (One of the 98 bookmakers convicted last year in Toronto was taking in more than a quarter of a million dollars a week just on National Football League games.) In Winnipeg nine known bookies took in nearly \$1.25 million in a four-month period.⁵²

In British Columbia, the situation is similar. According to a 1974 report, the amount bet illegally in British Columbia each year is estimated to be in excess of \$100 million.⁵³ In Vancouver, a recent investigation of only 17 of the nearly 100 known and active bookmakers revealed that they were collectively taking in more than \$120,000 a week.⁵⁴

49. United States, The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (E.P. Dutton & Co. Inc., N.Y. 1968), p. 440.

50. Criminal Intelligence Service Canada, op. cit. note 5.

51. Ibid.

52. Ibid.

53. Policy and Analysis Division, Co-ordinated Law Enforcement Unit, Ministry of Attorney-General, British Columbia, Initial Report on Organized Crime in British Columbia, October 1974, p. 18.

54. Criminal Intelligence Service Canada, op. cit. note 5.

One significant feature of gambling, and one often not recognized, is that even "independent" bookmakers are sometimes forced to "lay off" bets through larger gambling syndicates,⁵⁵ thus further contributing to the wealth and power of these syndicates. The "independent" bookmaker needs to protect himself in this way against the possibility of having unduly large amounts of money bet on one side or the other of an event. In doing so, he surrenders much of his independence to the parent syndicate.

The courts deal fairly leniently with gambling offences. For example, a gambling syndicate was recently broken up in British Columbia. Based on what police believe to be the records of the syndicate, an annual gross cash flow of between \$2 million and \$5.5 million was generated by that one syndicate, with the leader of the syndicate entitled to receive over \$4,000 per week in commission.⁵⁶ Pleading guilty to charges of keeping a common gaming house, each of the individuals involved, including the leader, was fined \$300.⁵⁷ This discouraging result occurred after painstaking investigation and careful analysis of the financial records of the gambling enterprise.

One reason for lenient treatment of gambling by the courts is the inconsistency of our gambling laws which allow, and even encourage, certain types of gambling under certain circumstances. But even legalized gambling attracts criminal involvement, and the danger of gambling lies not in the individual bets, but in the accumulation by criminal syndicates of vast

55. Without doing so, the bookie exposes himself to the possibility of substantial losses. His only alternative to "laying off" is to vacate his operation if his losses are too great. This could be dangerous if he is subsequently found by an unpaid winner.

56. This information is derived from confidential police files, Vancouver Integrated Intelligence Unit.

57. It should be mentioned that certain charges resulting from raids performed simultaneously with the one that had this result ended up differently: the owner-manager of one club was fined \$10,000. However, fines as large as this are very unusual in gambling cases.

amounts of money and in the relationship between gambling and other types of activities such as corruption of public officials, loansharking and dealing in narcotics.

Under the present framework of the criminal law, it would rarely be possible (in the legal sense) to prosecute gambling offences and other, non-gambling, offences at the same time. Other offences (such as trafficking in narcotics, "arson-for-hire," etc.), although they may be carried out by the same members of the criminal syndicate at the same time as the gambling offences, would usually be the subject of separate trials. This arises from the fact that evidence of other criminal activities would be irrelevant on a trial for a gambling offence. The unfortunate result, however, is that the courts do not (because they are not permitted to) see professional gambling operations in their true context: as one part of a multi-faceted criminal enterprise.

(D) LABOUR CORRUPTION

The labour movement in the United States represents lucrative opportunities for enterprise crime. The amount of money in pension and welfare funds and the potentially disastrous effects of labour unrest are elements that can easily be used for personal gain when a union is corruptly controlled.

"Control of labour supply and infiltration of labour unions by organized crime prevent unionization of some industries, provide opportunities for stealing from union funds and extorting funds from the enormous union pension and welfare systems for business ventures controlled by organized criminals. Union control also may enhance other illegal activities. Trucking, construction and waterfront shipping entrepreneurs, in return for assurance that business operations will not be interrupted by labour discord, countenance gambling, loansharking and pilferage on company property. Organized criminals either direct these activities or grant "concessions" to others in return for a percentage of the profits."⁵⁸

58. The Challenge of Crime in a Free Society, p. 445.

First revealed by the Kefauver Committee in 1951, the widespread corruption of the labour unions in the United States is well documented and publicized.⁵⁹ It has been estimated that 300 union locals in the United States "are severely influenced by racketeers."⁶⁰ In Canada, unions do not have the vast funds in pension and welfare plans that they do in the States, so corruption here is of a slightly different character. And, although there have been comparatively few confirmed incidents of union corruption in Canada, especially in the west, there is no reason to believe that Canadian unions are immune from corruption. The Cliche Commission⁶¹, for example, detailed incidents of corruption in the construction industry in Quebec. Andre Desjardins, one time boss of Quebec's construction unions, was recently charged with extorting more than \$400,000 from a dozen building firms in the early 1970's.⁶² Soon after those charges were laid, Jean Charbonneau, a placement officer for a Union Local affiliated with the Quebec Federation of Labour (Q.F.L.), was charged with 15 counts of forgery. The counts related to a government-sponsored course on safety on the job, for which he was alleged to have forged diplomas for union officers, workers and contractors who were suspected to have never attended class.⁶³

59. The Kefauver Committee is discussed in the section of this paper on the legislative history of R.I.C.O.

See, for example: Blakey, G.R., Goldstock, R., and Bradley, G.V., The Investigation and Prosecution of Organized Crime and Labor Racketeering/Labor Racketeering: Background Materials, (Cornell Institute on Organized Crime, 1979).

- Brill, Stephen, The Teamsters, (Simon and Schuster, N.Y. 1978).

- Finley, Joseph E., The Corrupt Kingdom: The Rise and Fall of the United Mine Workers, (Simon and Schuster, N.Y. 1972).

- U.S. Congress, Senate Committee on Government Affairs, Permanent Subcommittee on Investigations; Labour Management Racketeering--Hearings Before the Senate Permanent Subcommittee on Investigations, 95th Congress, 2nd Session, April 24 and 25, 1978.

60. Blakey, Goldstock, Bradley, p. 3. Comment attributed to Benjamin Civiletti by the authors.

61. Province of Quebec, Rapport de la Commission d'Enquete sur l'exercice de la Liberte Syndicate dans l'industrie de la construction (Quebec 1975).

62. "Extortion charged Union boss", Victoria Times, 29 February 1980.

63. "'Teacher' accused of forgery", Montreal Gazette, 26 March 1980.

According to Quebec newspapers,

"Charges against Charbonneau were the latest in a series of unconnected incidents of alleged forgery, extortion and theft that have been laid against a total of 10 union officials in the construction industry in the last four months."⁶⁴

The same week, an eleventh Q.F.L.-affiliated union officer was charged with stealing from the union to pay for repairs to his home.⁶⁵

The Waisberg Report⁶⁶ examined at certain sectors of the building industry in Ontario. The report details numerous incidents of threats, shootings and bombings. Judge Waisberg states:

"[In the construction industry in Ontario between 1968 and 1972] there were four incidents of threatening, 234 of wilful damage, 15 of assault, 23 of arson and five explosions, as well as many other offences such as thefts and breakins. These figures are confined to the incidents that occurred on construction sites, but as you will see from this report there were many violent incidents that did not occur on construction sites but which nevertheless were generated by conditions in the sectors of the construction industry under investigation.

"...As I listened to the many witnesses who described what took place, it seemed to me that during this latter period a new and sinister element had been introduced to the building industry. The events were not impulsive responses to provocation, nor did they occur in a vacuum. They were associated in time and place with competition between contractors, competition between unions, and conflicts between contractors and unions."⁶⁷

The Waisberg Report mentions the threatening of Jean-Guy Denis while he was business agent of the Plasterers and Cement Masons' Union. The television program "Connections" shown by the C.B.C. on June 12, 1977, portrayed this threat as part of an unsuccessful attempt by members of a reputed organized

64. Ibid.

65. "Union manager charged with theft of \$3,000 from local", Montreal Gazette, 28 March 1980.

66. Ontario, Report of the Royal Commission on Certain Sectors of the Building Industry I, (Queen's Printer for Ontario, 1974), 2 Vols.

67. Ibid, pp. 31-32.

crime family in Ontario to take control of his union local. Jean-Guy Denis was interviewed on the program:

"Initially, I was asked of course to set up a different union, or separate from the union, for whom I presently work and form my own union, and they would have offered the services of their employees...and they would see to it that I was re-elected. They would see to it that there were no problems within the union, and anybody who would dare to interfere would be dealt with, taken care of. When I refused this, I was at one time told well, just be careful cause on your way home, a car might run you down or you might not make it home tonight. Ah...at a later date, at the second meeting with these same people, they offered me five cents an hour on every hour worked by these men which could have amounted to seven to eight hundred men. On an hourly basis, they would have paid five cents an hour which would have come directly to me...as a payment to simply stay off the job, let someone police the job, and these were the two employees of the company. And my only responsibility was to be as I was told and mind my own business. And when I turned that down, again I was threatened."68

The above examples can be viewed as indicators of a possible future trend. Because unions provide lucrative opportunities for crime, we believe that union corruption in Canada may increase beyond its present level. Historically, social and criminological phenomena often appear in the United States several years before they are visible here. Moreover, intense investigations and harsh penalties for labour corruption in the United States may result in the transfer of corrupt individuals and corrupt activities north of the border.

The prosecution of a complex labour corruption case would be cumbersome under existing Criminal Code provisions, because it could involve numerous interrelated acts of embezzlement, bribery and extortion occurring over a period of several years. It would rarely involve merely one or two illegal acts. Furthermore, once a union has been permeated, it is difficult to rid it of the corrupting influences. It is not uncommon for control of the union to be sought expressly for criminal purposes, and neither is it uncommon for a

68. Transcript of program "Connections" aired on television June 12, 1977, by the Canadian Broadcasting Corporation.

convicted labour leader to be re-elected by the union membership. In British Columbia, for example, there is no law prohibiting a person with a serious criminal record from seeking or maintaining positions of power in a union. This is governed solely by the union's own constitution and bylaws.⁶⁹

(E) OUTLAW MOTORCYCLE GANGS

The existence of criminal gangs in our society is hardly a new phenomenon. The expertise and protection of a group lessens the risk and increases the profitability of many criminal activities.

The most visible of criminal gangs are outlaw motorcycle gangs, a great concern to law enforcement agencies in Canada. While not all motorcycle gangs engage in criminal activity, the ones that do are violent and powerful:

"In the last several months there has been considerable media coverage of the activities of outlaw motorcycle gangs. The activities of these gangs have always been a major concern to Canadian police forces. The members of these gangs have a complete disregard for the laws of our land and they thrive in a violent world of drugs, murders and bombings. No longer are outlaw motorcycle gangs just individual clubs, but rather have grown into structural organizations with strong international affiliations."⁷⁰

The concern over motorcycle gangs in Quebec prompted a Commission of Inquiry into their activities.⁷¹ Among the findings of the Commission were an hierarchical structure common to all criminal gangs and a diversification of criminal activities: motorcycle gangs are involved in the manufacture and distribution of hallucinogens and other synthetic drugs, in organized

69. Telephone conversation with Mr. Ron Tweedy, Assistant Deputy Minister's Office, Ministry of Labour, British Columbia.

70. "Organized Crime Committee", Canadian Police Chief, October 1979, p. 53.

71. Commission de Police du Quebec, Enquete sur le crime organize, Les Bandes de Motards au Quebec (Editeur Officiel du Quebec, February 19, 1980).

prostitution, motor-vehicle thefts and gunrunning. Some are employed as enforcers for loansharks, gamblers and fences.⁷² Some are hired killers.⁷³

These gangs are difficult to investigate and prosecute. They have rigid entrance requirements that effectively prevent the infiltration of the gang⁷⁴ and they excel in the intimidation of witnesses:

"Above all, the biker, more than any other, is familiar with this formidable weapon which strikes right at the heart of the legal system, perjury under threat. In Quebec we no longer count the number of accuseds who have gotten away due to intimidation of witnesses. In that sense, bikers are experts in physical violence."⁷⁵

Of substantial concern to police are the growing international ties of local gangs and the increasing territorialization of the gangs.

"In Quebec, within the past year, there have been seven murders involving motorcycle gang members. These murders are directly related to the continuing rivalry between two United States based gangs. These two gangs are the 'Hells Angels' (sic) and the 'Outlaws' who are attempting to establish close affiliation with Canadian gangs and thereby assure themselves access to illicit drugs manufactured in Canada."⁷⁶

Indicative of the extent of the ties of Canadian gangs with American ones was a recent funeral of a Quebec member of the Hell's Angels Motorcycle club portrayed on the C.B.C. Television program "Connections II". According to the producers of the show, the funeral was attended by members of the Hell's Angels motorcycle club from every chapter in North America. The ritualistic

72. Ibid. p. 79, trans. by Nicole Hickens, C.L.E.U., Ministry of Attorney-General, Vancouver, B.C.

73. Ibid p. 80, also: Canadian Broadcasting Corporation, "Connections II", Part III, aired on March 28, 1979, 10:00-11:00 p.m.

74. Before acceptance as a member, a man must commit criminal acts--often of a serious nature. This effectively prevents infiltration by undercover policemen and ensures that any infiltrator would be a criminal before he was privy to information.

75. Commission de Police du Quebec, op. cit., note 71, p. 79. Trans. Nicole Hickens.

76. "Organized Crime Committee", op. cit., note 70, p. 53.

nature of the funeral was likened to those of the "early days of the Mafia in America."⁷⁷

The nature of these gangs has allowed them to become increasingly prosperous. Police sources state that intelligence information indicates a Canadian motorcycle gang sold speed with a street value of \$1,920,000 to an American gang over a three-month period in 1978.⁷⁸ The program "Connections II" portrayed an illegal drug laboratory situated in northern Ontario, estimated to have produced \$30 million worth of drugs.⁷⁹ It also showed homes owned by members of bike gangs or owned by investment companies formed by the clubs:

"Such wealth has enabled certain bike gangs to flaunt society in a different way, like the California Hell's Angels who posted bail of \$3 million for one of their members and then called for him in a chauffeur-driven Cadillac limousine."⁸⁰

A recent illustration of the prosperity of the gangs is the case of a member of the "Grim Reapers" motorcycle club in Calgary. He had 23 prostitutes working for him, grossing \$50 to \$60 thousand a month. He controlled a number of corporations with assets exceeding \$1 million, and he lived on property valued at over \$600,000. At the time of his arrest, vehicles and other movable properties valued at over \$60,000 and \$207,000 in cash were seized.⁸¹

While it is possible under existing criminal law to allege an accused's membership in a motorcycle gang as part of the Crown's case, it would be difficult to present in a single criminal case the multi-faceted nature of the crimes engaged in by the gangs, the wealth obtained from those activities and the way in which those activities were linked with the criminal activities of other motorcycle gangs in United States and Canada. In other words, our criminal law does not focus on the activities of the gang itself, but on the activities of the individuals that formed part of the gang.

77. C.B.C., "Connections II", op. cit., note 73.

78. Canadian Association of Chiefs of Police, Annual Report 1979. Restricted Document.

79. C.B.C., "Connections II", op. cit. note 73.

80. Ibid.

81. Criminal Intelligence Service Canada, op. cit. note 5.

(F) WHITE COLLAR CRIME

"White collar" crime is a somewhat misleading descriptive term denoting non-violent, financial crimes. It has been precisely defined as,

"...an illegal act or series of illegal acts committed by non-physical means and by concealment or guile, to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage."⁸²

White collar crimes are often called "commercial" crimes. Stock market frauds, fraudulent bankruptcies, frauds on government, and computer crimes are examples of "commercial" or "white collar" crime.

Commercial crimes are lucrative. In British Columbia, commercial crimes involving about \$70 million were investigated in 1979, and this figure may represent only 10 per cent of the total amount lost.⁸³ Each individual scheme involves a far greater sum of money than other types of crime. According to Superintendent R.N. Mullock, head of the R.C.M.P.'S Commercial Crime Section in Vancouver, the average commercial crime these days involves more than \$100,000 and the average computer crime more than \$500,000.⁸⁴ In the United States, law enforcement authorities estimate that business losses to so-called "white collar crimes" can be valued at three per cent of the Gross National Product. In Canada that amounts to \$6.3 billion.⁸⁵

82. U.S. Department of Justice, Law Enforcement Assistance Administration, The Investigation of White-Collar Crime: A Manual for Law Enforcement Agencies, (U.S. Govt. Printing Office April, 1977) p. 4, as taken from Herbert Edelhertz, The Nature, Impact, and Prosecution of White-Collar Crime.

83. Durrant, Patrick, "White Collar Crime goes Unreported", Vancouver Province, 29 November 1979.

84. Ibid.

85. Criminal Intelligence Service Canada, op. cit., note 5.

Another general statement that can be made about commercial crimes is that they involve relatively little risk. Many go unreported because business firms wish to avoid publicity and because victims of "scams" are embarrassed about being duped. But even if reported, the nature of many of the schemes makes them difficult and time-consuming to investigate and prove. In these types of crimes, the accused can usually afford experienced and competent legal counsel, who is able to make the most of the complexities of the case, its non-violent nature, and his client's "respectability." The result is often a relatively light sentence in comparison to the amount of money involved.

The incidence of this class of crime is bound to increase. The growing complexity of our economic system and an increasing reliance on technology in business and government augment the number of opportunities for the perpetration of sophisticated and lucrative types of fraud.

Although commercial crimes are appropriate crimes for victim restitution, since the amounts involved are often large and the perpetrators more likely to be solvent than other criminals, in practice victims are not often compensated for their losses. Because the facts are complicated, criminal court judges prefer to leave restitution to the civil courts. The cost involved in bringing a civil suit will sometimes deter the victim, and the delays involved in such suits can provide opportunities for property to be disposed of or transferred out of the country. If the fraud involved taking small amounts from a large number of people, there is little danger of a civil suit because of the expense and trouble involved.

(G) LAUNDERING OF MONEY AND INFILTRATION OF LEGITIMATE BUSINESS

"Laundering of dirty money" and "infiltration of legitimate business" are terms that encompass a broad range of activities.

"Laundering of dirty money" refers to any process by which money obtained by crime is made to appear as though it were accumulated legally. Money is "laundered" so that it may be openly used without attracting attention from law enforcement agencies or tax officials. There are numerous ways to launder

money. Some involve processing the ill-gotten funds through a legitimate business that deals in cash, such as a bar or a car wash. Others involve a complicated series of "loans," "purchases" and "sales," aided by crooked financial intermediaries and straw men. Sophisticated laundering schemes take advantage of foreign bank and corporate secrecy laws by routing the money out of the country. This money re-enters the country in the form of "loans" to the criminal or as "investment capital" put up by undisclosed principals.

The "infiltration of legitimate business" refers to the corrupt use of a legitimate corporation or organization, as well as the acquisition of legitimate business interests through criminal activities.⁸⁶ Examples of "infiltration" include acquiring a business with the proceeds of crime, using a business to launder money or as a front for criminal acts, the coercive takeover of a business by a loanshark, and the corrupt use of a labour union. It is noteworthy that there is no agreement on the ultimate motivation for infiltration.⁸⁷ However, both "laundering" and "infiltration" are activities indicative of high level, organized and sophisticated criminal activity, whether motivated by a desire for legitimacy, or by the wish to disguise ongoing criminal activities.

Although law enforcement agencies here are keenly aware of the phenomenon, it is impossible to determine to what extent funds are laundered and businesses infiltrated because of the lack of currency reporting laws;⁸⁸ the lack of concern on the part of regulatory agencies over beneficial ownership⁸⁹; the

86. See National Institute of Law Enforcement and Criminal Justice, The Penetration of Legitimate Business By Organized Crime--An Analysis, (U.S. Department of Justice, April 1970).

87. There have been three general theses proposed as to motivation: one stresses the desire for legitimacy, one interprets it as a first step to a comprehensive "takeover" of the economy and the government, and the other sees infiltration as a base of power secondary to that of criminal enterprises. See *ibid.*, pp. 3-5.

88. Currency reporting laws, which mandate the reporting of the movement of large sums of money, can give law enforcement agencies an idea as to the extent of movement.

89. See the section on "The Use of Regulatory Agencies" in this paper.

difficulties involved in tracing funds, including lack of access to banking records without a search warrant⁹⁰; and the absence of a justifiable reason to investigate financial background.⁹¹ In spite of these difficulties, however, law enforcement agencies here have been able to discover extensive permeation of the legitimate business community by persons linked with powerful criminal syndicates in the United States and by persons who have had a lengthy involvement with police.

One report prepared in July of 1979 by the Vancouver Integrated Intelligence Unit in British Columbia revealed that there were "122 criminal figures in the Greater Vancouver area involved in 134 legitimate businesses."⁹² The report does not specify which of these businesses were active, the net worth of any of the businesses, nor the uses to which the businesses were put. However, the study is significant because it indicates many sophisticated criminals have ties with the business community.

Law enforcement agencies in Eastern Canada see strong links between several individuals living in Ontario and Quebec, and "traditional" criminal syndicates in the United States. Many of these individuals are known to have significant interests in the legitimate Canadian business community. Interests in the textile industry, the cheese industry, the building industry, the disposal industry, vending machine companies, meat companies, home insulation companies, auto body shops, and car dealerships have all been traced to individuals considered by Canadian police intelligence officers to fit accepted descriptions of "organized crime."⁹³ One individual, who has

90. A search warrant can only be used as part of an active investigation. It cannot be used on a "fishing expedition" or merely to gather intelligence.

91. There are few legal reasons to bring the financial background of an accused to the attention of the court.

92. Confidential police report prepared by Vancouver Integrated Intelligence Unit, on file with that office.

93. Confidential report received from Metropolitan Toronto Police Department (Intelligence Unit).

maintained historic ties with a reputed organized crime family, has amassed various investments and real estate holdings valued at approximately \$7 million.^{94, 95}

The Quebec Crime Commission detailed the extensive wealth and legitimate business interests of William Obront, Mitchell Bronfman and Solly Levine in a 1977 report.⁹⁶ William Obront was found to have had beneficial interests in at least 38 legitimate companies.⁹⁷

Both "laundering" and "infiltration" are secondary activities which flow from prior criminal activity. By and large, our criminal justice system is directed towards the predicate criminal offences to the exclusion of secondary activities. This focus allows criminals to build substantial "legitimate" financial empires. If left unchecked, these can be used to monopolize complete sectors of the economy and to influence and corrupt politicians. The power associated with the legitimizing of criminal wealth, in our opinion, constitutes at least as great a danger to the social order as the individual crimes that were committed to obtain that wealth.

94. Private submission received from Metropolitan Toronto Police Department (Intelligence Unit).

95. At a meeting of intelligence officers in Ontario held in January, 1979, immediate adoption of the Racketeer Influenced and Corrupt Organizations Statute was urged to deal with the problems of infiltration.

96. Quebec Police Commission, Report of the Commission of Inquiry on Organized Crime and Recommendations: Organized Crime and the World of Business, (Editeur Officiel du Quebec, 1977).

97. Ibid., pp. 75, 79-81.

III. THE STATE OF EXISTING CRIMINAL LAW IN CANADA

Nothing in our existing criminal law is expressly designed to provide for the types of prosecutions and the types of remedies necessary to combat enterprise crimes. The law of conspiracy and the offences created by section 312 of the Criminal Code (both discussed below) provide some opportunity for the imaginative prosecutor to attack enterprise crimes, but they have serious limiting factors. As far as remedies are concerned, nothing in Canadian criminal law is expressly designed to provide for the forfeiture of illicit profits upon conviction. Moreover, there is no direct way of separating the criminal from a business operated by him in a criminal manner, although various regulatory agencies have some potential in this direction.

(A). CRIMINAL CODE FORFEITURE PROVISIONS

The Criminal Code contains a surprisingly large number of forfeiture provisions, but these represent piecemeal attempts to deal (in a very specific manner) with a specific type of property. In many cases, they are designed only to remove from the hands of convicted persons an object whose possession is unlawful, in order to avoid any repetition of the offence. The very limited nature of these provisions can be seen from this listing of them:

Section 100(3): restricted weapons, prohibited weapons, and firearms which are possessed illegally;

Section 181(3): any item (seized pursuant to a search warrant under section 181(1)) which provides evidence of keeping a common gaming house, keeping a common betting house, bookmaking, placing bets on behalf of others, lotteries and other games of chance, or keeping a common bawdy house;

Section 281.2(4): anything by means of or in relation to which the offence of "inciting hatred against any identifiable group" has taken place;

Section 281.3(3): "hate propaganda";

Section 287.1(2): "black boxes" (instruments designed to obtain telecommunications services without paying for them);

Section 352(2): anything by means of or in relation to which the offence of fraud in relation to minerals has been committed;

Section 353(2): precious metals or rocks which are being "held" by any person contrary to law;

Section 359(2): anything by means of or in relation to which the offence of obtaining the "carriage" of anything by means of a false representation has been committed;

Section 370(2): anything by means of or in relation to which the following offences have been committed: forging a trademark, passing off wares or services with intent to defraud, making use of a description of wares or services that is false, possessing an instrument for forging trademarks, defacing, concealing or removing a trademark, selling or having in possession goods that have been reconditioned but still bear the trademark of the original manufacturer;

Section 403(2): birds being kept for the purpose of cockfights;

Section 420(2): counterfeit money and counterfeit tokens of value;

Section 446(3): this is the "general" forfeiture section and will be discussed below;

Section 446.1(1): any weapon which has been used in the commission of an offence;

Section 447(2): any explosive substance which has been seized pursuant to section 447(1).

Section 446 of the Criminal Code is of somewhat more general application but its usefulness is nevertheless limited. This section provides for the forfeiture of something which meets all of the following criteria:

- it is a tangible and portable object;
- and it has been seized pursuant to a search warrant issued under section 443 of the Criminal Code;
- and it has been brought before a Justice of the Peace;
- and the Justice is satisfied that the object seized is no longer required for the purposes of any investigation, preliminary inquiry, or trial;
- and the Justice is satisfied that possession of the object by the person from whom it was seized is unlawful;

- and the Justice is further satisfied that the lawful owner of the object or the person entitled to possession of it is not known.

The power of forfeiture in section 446 is noteworthy for what is excluded rather than what is included. Intangibles, such as shares in a corporation or an interest in a partnership, could never be forfeited. Things which are not capable of being "brought before a Justice", such as real estate, aircraft, and large boats, do not fall within the terms of the section. Anything seized by a peace officer acting at a time when he had no search warrant, although the seizure may be perfectly lawful, can never be the subject of a forfeiture under section 446.¹ Anything entered as an exhibit at a preliminary hearing or trial is removed from the operation of the section.

Finally, a Justice can only order forfeiture of an object if possession of it by the person from whom it was seized is unlawful. This latter provision has been interpreted very narrowly to mean that forfeiture under section 446 can only be ordered if some other, specific forfeiture provision in the Criminal Code applies to the object in question. In other words, this narrow reading of section 446 means that it does not add any forfeiture power at all to the list of specific forfeiture provisions given above.² Thus, in a case where several thousand copies of allegedly pornographic magazines were seized but no specific Criminal Code forfeiture provision existed, the court stated that even if the magazines were found to be pornographic they could not be forfeited under section 446.³

1. The power of a police officer to seize property when not armed with a search warrant has been described as follows: "After making an arrest an officer has the right to search the prisoner, removing his clothing, if necessary, and take from his person, and hold for the disposition of the trial court, any property which he in good faith believes to be connected with the offence charged, or that may be used as evidence against him, or that may give a clue to the commission of the crime or the identification of the criminal, or any weapon or implement that might enable the prisoner to commit an act of violence or effect his escape." Gottschalk v. Hutton (1921) 36 C.C.C. 298, 302--Alberta Court of Appeal.

2. Regina v. Nimbus News Dealers and Distributors Ltd. (1970) 11 C.R.N.S. 315--Ontario Provincial Court.

3. Ibid.

In view of the limiting factors mentioned above, it is not surprising to find that significant forfeitures under section 446 rarely occur. Even if it were legally possible to obtain forfeiture of intangible property such as the amount of money standing to the credit of a person in a bank account, there is no way in which such assets can be "frozen" pending a court ruling. When investigators have located property which they think could be forfeitable, they have only one way in which to prevent the suspect from disposing of it prior to trial: physical seizure of the asset. If it is impossible to physically seize the asset, nothing in the criminal law restrains the suspect from disposing of it. Intangible assets will simply be transferred to some other person or corporation, or perhaps hidden abroad, once the suspect realizes he has fallen under police scrutiny. By the time of conviction, there will usually be nothing left to forfeit even if forfeiture were possible under the law.

In some cases there may be an identifiable owner of the asset in question (other than the suspect) who is prepared to sue civilly for the proceeds of the crime. In such cases, an injunction may be granted to restrain any disposal by the suspect of the illegally obtained property.⁴ But such an action must always depend upon the existence of a victim who is willing to sue civilly.

(B). FORFEITURE OF OFFICES

At common law the real property of a person convicted of a felony escheated to the Crown and his personal property was forfeited.⁵ When these provisions of the common law were repealed in England in 1870, it was provided that any

4. This occurred in the case of The Merchants Express Company v. Morton (1868) 15 GR. 274, wherein some premises purchased with the proceeds of a robbery were made the subject of an injunction.

5. Russell on Crime, 10th edition, edited by J.W.C. Turner, (Stevens and Sons Ltd., London, 1950) page 4. Also see Stephens' History of the Criminal Law of England, London, 1883, pages 487 and 488.

person convicted of a felony and sentenced to imprisonment for a period exceeding 12 months forfeited any office of a military, civil, ecclesiastical, or public nature.⁶

The Criminal Code of Canada (in section 682) provides only that a person who is sentenced to imprisonment for a term exceeding five years forfeits any Crown office or "other public employment" that he holds. Such a person is also incapable of being elected to or taking a seat in Parliament or a Legislature and may not exercise "any right of suffrage." However, a perusal of sentences being imposed in Canada at the present time reveals that rarely is someone sentenced to imprisonment for a term exceeding five years unless the crime involves a substantial degree of violence or large-scale drug trafficking. Commercial or enterprise crimes, of even the greatest magnitude, are being punished with sentences of imprisonment ranging from one to five years. Accordingly, it may be deduced that section 682(1) is virtually meaningless at the present time.

Section 682(3) of the Criminal Code provides that anyone convicted of a fraud upon the government, selling or purchasing office, or selling defective stores to Her Majesty, loses his capacity to contract with the Crown and to hold any Crown office. The specifying of these three particular offences, and the omission to specify other equally serious offences, does not appear to be supportable. Usually, a complex set of facts may be an offence under each of several different Criminal Code provisions, and the selection of the section under which to proceed is made by the prosecutor. A prosecutor, for any of a number of technical reasons, might prefer to prosecute a case of fraud upon the government under section 338 (the general fraud section) rather than under section 110 (the specific section involving fraud upon the government). If the choice is made to prosecute under section 338 and a conviction results, section 682(3) will not prevent the accused person from holding public office or entering into government contracts. Why should the forfeiture of a Crown office or a government contract depend upon the choice of Code section by the prosecutor? Why should it be limited to sentences in excess of five years, which are rarely imposed in white collar or commercial crime cases?

6. Forfeiture Act (1870) 33 and 34 VIC. C. 23.

(C). SENTENCING POWERS

Since there is no limit in Canadian criminal law to the size of fine which may be imposed for an indictable offence, it might be thought that fines would be sufficient to remove the profit incentive from enterprise crimes. In practice, it does not appear that fines are used frequently for this purpose. While it is recognized that one of the purposes of sentencing is to prevent the criminal from making a financial profit from his crime, it is not a factor which receives much attention or analysis in the decided cases.⁷

When truly serious enterprise crimes have been committed, the principles of deterrence and protection of the public are usually said to require lengthy jail terms. Many judges, when imposing a lengthy term of imprisonment upon an offender, do not wish to impose the added penalty of a fine. This appears to be so even in cases where it is clear that the profit from the crime involved must have been enormous. For example, in a case in which the convicted persons were "the wholesale supply source of capped heroin for the Vancouver market" the Trial Judge sentenced two of them to 15 years' imprisonment and a fine of \$10,000.00.⁸ The British Columbia Court of Appeal increased these sentences to life imprisonment but two of the three judges declined to impose any fine at all on the men. In another case, a man who was caught importing between \$1 million and \$2 million worth of marijuana was sentenced to imprisonment for eight years, but neither the Trial Judge nor the Newfoundland Court of Appeal imposed a fine.⁹ A group of people found in possession of between \$3.5 million and \$4.5 million worth of heroin were each sentenced to 20 years' imprisonment; no fine was imposed although the evidence had demonstrated that at least \$261,000.00 had been sent by the group to Hong Kong within a five-week period.¹⁰

7. See Clayton Ruby, Sentencing, Butterworth's, Toronto, 1976, page 231.

8. Regina v. Ponak and Gunn (1973) 11 C.C.C.(2d) 346--BCCA.

9. R. v. Carr (1978) 42 APR 270--Newfoundland CA.

10. Regina v. Ma, Ho and Lai (1979) 44 C.C.C.(2d) 537--BCCA.

It may well be asked why any fine at all should be imposed in a case where the individual is going to be sent to jail for many years in any event. First of all, it should be noted that convicts frequently become eligible for parole after having served about one-third of their sentence,¹¹ whether or not they are paroled at that time. In the case of the people mentioned above who were "the wholesale supply source of capped heroin for the Vancouver market" and who were sentenced to life imprisonment, they will be eligible for parole after seven years from the date of sentencing. The vast profits made during the course of these lucrative conspiracies, less whatever had to be spent on lawyers' fees and to support the families of the accused persons, will still be available when the convicts are released. Moreover, if any members of the criminal enterprise remain at large, then the profits from the group's activities will still be available to those members. This pool of working capital can be used to finance illicit operations which gain further profit for the enterprise. Upon being released from prison, the gang members who were convicted may actually find that their share of the profit has increased considerably during their years of incarceration. It is for these reasons that a large fine is often an appropriate penalty in addition to a lengthy term of imprisonment. Moreover, whether a man is sentenced to imprisonment or not, there is something manifestly inappropriate about allowing the profits of crime to remain in his hands.

When fines are imposed, the amount of the fine is not necessarily related to the size of the profit. The court will always consider the means and ability of the offender to pay, and these matters are not usually the subject of any type of evidence. Assertions by defence counsel that his client is now impecunious will usually be accepted without scrutiny, as is the case with other "facts" submitted on the question of sentence. It is not usual for the Crown to tender evidence at sentencing concerning the amount of profit involved in the crime because such evidence is rarely available. The result is that judges, lacking any direct means of assessing the profit involved, decline to guess at it and refrain from imposing a fine.

11. Parole regulations, S.O.R. 78-524, S.O.R. 78-628, and S.O.R. 79-88.

Where a fine is imposed, it should not be thought that the fine will necessarily equal or exceed any profit which has been shown to exist. In a case involving the importation of about \$3.5 million worth of cocaine, the two ringleaders were fined \$50,000 each (in addition to sentences of imprisonment for 20 years).¹² Where fines are imposed without any accompanying term of imprisonment, the result often looks somewhat like a licence to continue engaging in the illegal activity.

Essentially, the fine is a substitute for terms of imprisonment and probation and tends to be imposed as the "penalty of last resort." It is not designed to remove the profits from the hands of criminals, and attempts to use it in that way have been sporadic.

(D). COMPENSATION AND RESTITUTION

The powers of compensation and restitution provide a means for depriving offenders of the fruits of their crime in certain types of cases. By virtue of section 655 of the Criminal Code, a court that convicts an accused of an indictable offence "shall order" that property obtained by the offence be restored to the person entitled to it. It has been held, by virtue of the very broad definition of "property" in section 2 of the Criminal Code, that this restitution provision extends to any property into which the original item has been converted.¹³ However, the usefulness of the provision is limited by the requirement that the property be "before the court" or that it be "detained so that it can be immediately restored" to its owner.¹⁴ It is our opinion that these phrases necessarily limit application of the provision to tangible items which are capable of being possessed; such things as credit in a bank and shares in a company could never be the subject of an order for restitution.

12. R. v. Bengert et al (Aug. 3rd, 1979) unreported--SCBC. 13. R e g i n a _ v _ Percival and McDougall (1973) 10 C.C.C.(2d) 566-SCBC.

13. Regina v. Percival and McDougall (1973) 10 C.C.C.(2d) 566-SCBC.

14. Section 655(1), Criminal Code of Canada.

Section 653 of the Criminal Code provides that, upon conviction for an indictable offence, an offender may be ordered to pay a sum of money by way of compensation. Unlike an order for restitution, this provision is not limited to property which was obtained by crime or the proceeds of such property. However, a compensation order may only be made "upon the application of a person aggrieved", and the amount paid must reflect directly the amount of loss suffered by the applicant.

While neither the restitution nor the compensation sections are limited as to dollar amounts, the sections may only be invoked where there is an identifiable victim and an ascertainable loss by him. The so-called victimless crimes such as trafficking in narcotics, bookmaking, prostitution, and pornography, which are especially favoured as enterprise crimes, cannot result in compensation orders upon conviction. Moreover, the Supreme Court of Canada has recently held that where there is a "serious contest" as to the amount to be paid by way of compensation or as to whether or not the victim is entitled to such an order, then no such order should be made.¹⁵ However, the Court upheld the constitutionality of the compensation provisions and, in doing so, quoted with apparent approval a statement by the Law Reform Commission of Canada that restitution should become a central consideration in sentencing.¹⁶

(E). FORFEITURE UNDER THE NARCOTIC CONTROL ACT AND OTHER FEDERAL STATUTES

The provisions of section 10 of the Narcotic Control Act provide a limited potential for the forfeiture of the proceeds of illegal narcotic sales.¹⁷ Under that section, a police officer may search for and seize any "things by means of or in respect of which he reasonably believes an offence" under the

15. Regina v. Zelensky (1978) 3 W.W.R. 693 at page 712.

16. See Working Paper No. 5, Law Reform Commission of Canada, October, 1974, at page 6 ff.

17. Narcotic Control Act, R.S.C. 1970 Chapter N-1 and Amendments thereto, section 10(5) to 10(9), inclusive.

Narcotic Control Act has been committed or that "may be evidence of the commission of such an offence." In some circumstances, currency or negotiable instruments such as bank drafts may qualify for seizure. Whether or not currency and negotiable instruments can be seized will depend upon the strength of the evidence linking them with the business of drug trafficking or importation.

The primary purpose of such seizures is to gather evidence for the prosecution of the offender. Things which are incapable of being tendered in evidence, such as intangible items or pieces of real estate, could never be seized. In any event, not every object which may be seized is subject to forfeiture. Section 10 only provides in express terms for the forfeiture of narcotics, narcotic apparatus, money "that was used for the purchase of" a particular narcotic, and aircraft, vessels, and motor-vehicles used in connection with the offence in question. It will be noted that any money seized must be shown to have been used to purchase the very narcotic which is the subject of the charge.¹⁸ Often, police investigators will find a quantity of narcotics hidden together with a quantity of cash. Sometimes there will be additional evidence to demonstrate that the cash is the proceeds of drug trafficking. Can this money be forfeited? The usual opinion is that it cannot, because the specific offence in question will relate to the quantity of narcotics found. The money could not possibly come from the purchase of that particular quantity of narcotics because, for obvious reasons, the purchaser will not part with his cash until the vendor has parted with the drug. In these circumstances, although forfeiture is impossible under section 10(8) due to the failure to link the money to a particular purchase, might not the money be forfeitable under the broader provisions of section 10(5), (6), and (7)?¹⁹ These three subsections have been interpreted very narrowly, in a manner suggesting that they provide no forfeiture power at all beyond that contained

18. Note the use of the phrase "purchase of that narcotic" in section 10(8).

19. These sections provide, inter alia, that the accused may recover possession of the money only where he is "entitled to possession." They also provide that if the accused fails to apply for recovery of the money within two months, then the Minister of National Health and Welfare may "make such disposition thereof as he thinks fit."

in subsection (8).²⁰ Moreover, the restrictive language of section 10(8) appears to require proof that the actual bills seized were obtained from the purchaser of the narcotic in question; if the cash were converted to (for example) a money order, it is rather doubtful that any forfeiture would be possible. The net result of all this is that large quantities of cash seized from persons convicted of drug trafficking or importation frequently have to be returned to the offender or his lawyer.²¹

Even where the police obtain possession of something which is clearly forfeitable under section 10(8) or 10(9) of the Narcotic Control Act, they are not necessarily entitled to retain that object in their possession until a forfeiture order is made. The Manitoba Court of Appeal has held, based on the wording of the section, that an accused person is entitled to have the forfeitable object returned to his possession unless and until a forfeiture order is made (the order will only be made after conviction).²² Of course, an offender who regains possession of an expensive item such as an aircraft and who foresees its ultimate forfeiture is entirely likely to dispose of it prior to trial. If the object of the restoration order is currency, it would be rather naive to expect the offender to hold that money "in trust" pending the outcome of his case. The Manitoba Court of Appeal recognized that disposal of the property might occur, and commented only that such an act "may affect the sentence to be imposed on the offender."²³

Thus, we have a situation where currency and negotiable instruments can only be forfeited if proven to have come from the purchase of the very narcotic

20. Smith v. The Queen (1976) 27 C.C.C.(2d) 252--Federal Court, Trial Division. It was held that sections 10(5) and (7) are "merely procedural and custodial" and "do not either explicitly or by necessary implication cause any property right to be forfeited."

21. Conversation with Mr. D. Bellemare, Counsel, Department of Justice, Montreal.

22. Re Hicks and The Queen (1977) 36 C.C.C.(2d) 91.

23. *Ibid.*, page 96.

which is the subject of the charge; even if that is the case, the accused is entitled to obtain restoration of the seized items prior to trial and dispose of them. A disposal of seized items might increase the sentence to be imposed, but the seized funds could nevertheless be available for future use by those members of the illegal enterprise at large. (Money from the disposal of seized items could also be used to secure bail, if the accused has not previously done so, or to retain a lawyer.)

Certain other statutes which create criminal offences contain forfeiture provisions, but these tend to be quite limited in their effect. The Food and Drugs Act (under which offences involving methamphetamine (speed), LSD, and other more exotic chemicals are prosecuted) contains precisely the same forfeiture provisions as are found in the Narcotic Control Act.²⁴ The Customs Act provides in very express terms for the forfeiture of an incredibly long list of items.²⁵ Of course, since these provisions are wholly concerned with smuggling offences they have only occasional application to organized or enterprise criminal activity. Very extensive and similar provisions are scattered throughout the Excise Act.²⁶

(F) LAUNDERED MONEY: POTENTIAL USES OF SECTION 312

In 1976, as a result of a recommendation made by the provincial Attorneys General, section 312 of the Criminal Code was amended and its scope was broadened considerably.²⁷ The present wording of the section is as follows:

24. Food and Drugs Act, R.S.C. 1970 Chapter F-27 and Amendments thereto, section 37 and section 45. The primary narcotics dealt with in the Narcotic Control Act are marijuana, hashish, heroin, opium, morphine, cocaine, and various derivatives thereof.

25. Customs Act, R.S.C. 1970 Chapter C-40 and Amendments thereto, section 141(10), and sections 153 to 244, inclusive.

26. R.S.C. 1970 Chapter E-12 and Amendments thereto.

27. The recommendation arose from the Uniform Law Conference of 1974.

"(1) Every one commits an offence who has in his possession any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from

(a) the commission in Canada of an offence punishable by indictment; or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment."

The purpose of the amendment was to provide an offence which would cover the laundering of funds and the importation of "dirty money" into Canada. But as far as can be determined, section 312 has never been used in Canada in the intended manner.²⁸ Although it continues to be used regularly in prosecutions of persons who are found in possession of stolen property, no attempt has been made to use it in sophisticated commercial crime prosecutions involving the laundering of funds. This can be attributed partly to the difficulty of proving the origin of funds. In the absence of legal presumptions and reverse onus provisions, it is necessary for the Crown to prove beyond any reasonable doubt that the allegedly laundered funds were derived from a particular criminal offence. This is undeniably difficult, although far from impossible.

Section 312 has considerable potential in cases involving enterprise crime, but it also suffers from two limiting factors. Its usefulness is limited by its dependence upon the concept of "possession," and the lack of any provision providing for forfeiture of the property or proceeds which form the subject matter of the prosecution.

The concept of "possession" is broadened considerably by the definition of "constructive possession" in section 3(4) of the Criminal Code, by the

28. Police authorities in Montreal, Toronto, and Vancouver, when interviewed by the authors, could not recall any prosecution concerning the laundering of funds.

provisions of section 21 concerning parties to an offence, and by the provision in section 316 that a person who "aids in concealing or disposing of" property has placed himself in possession. Taken together, these provisions serve to extend the concept of possession far beyond actual physical possession, so that a number of people involved in an enterprise crime may be simultaneously in possession of illegally acquired property. However, "possession" is necessarily limited to tangible items. Although it is not necessary for the Crown to show that an accused person was in actual physical possession of laundered funds in order to obtain a conviction under section 312, it is necessary to prove that the funds were capable of being possessed. If a courier for a money laundering operation is apprehended with a large quantity of currency in his personal possession, then both he and other persons who knowingly and actively participate in the operation are in legal possession of the monies. However, if the funds are deposited in a bank account by (for example) an electronic transfer of data from an American bank, then even the owner of that bank account cannot be said to have possession of anything. He may have ownership of a chose in action (bank credit), but this is not capable of being the subject of a charge under section 312.²⁹ Similarly, shares in a corporation could not be the subject of a laundering prosecution. Of course, an underworld figure may occasionally be found in actual possession of share certificates or a bank deposit book, and it is theoretically possible that these items could be the subject matter of a section 312 prosecution.³⁰ However, these objects are merely indicia of the ownership of what they represent, and are not to be confused with the actual shares or bank credit. Sophisticated criminals, while they might make use of bank and securities transactions to launder funds from criminal activity, will seldom allow themselves to be in physical possession of anything derived from crime.

29. See Colonial Bank v. Whinney (1886) 11 APP. CAS. 426 (House of Lords); J.C. Vaines, Personal Property, 4th edition, Butterworth's, London, 1967, page 11; Williams on Personal Property, 18th edition, Sweet and Maxwell Ltd., London, 1926, page 29 ff, and page 47 ff.

30. See the extended definition of "property" in section 2 of the Criminal Code.

There is no express provision in the criminal law providing for the forfeiture of the property in question after a conviction under section 312. As was explained above, it is possible under section 446 of the Criminal Code to obtain forfeiture of an item, possession of which is illegal, only in very specific circumstances. The item must have been seized pursuant to a search warrant obtained under section 443 of the Criminal Code (and not pursuant to any other statutory or common law power of search), it must have been brought before a Justice of the Peace and he must be satisfied that the item will not be required for the purpose of any legal proceedings and that the lawful owner of the item or the person entitled to possession of it is "not known." If the item has evidentiary value and is therefore entered as an exhibit at a preliminary hearing or trial, the Justice has no jurisdiction to order forfeiture under section 446. But if the item is not entered as an exhibit because of a lack of evidentiary value, then (presumably) there was no authority to seize it in the first place. Moreover, it has been suggested that there is no forfeiture power provided by section 446(3) at all beyond that which is provided in more specific terms in other sections of the Criminal Code.³¹ The result is that, in many cases, there is no authority for the forfeiture of laundered money (or other items) even if possession by the offender has been proven to be illegal.

It should not be thought that section 312 is wholly lacking in usefulness when the laundering of funds is considered. The section does have some significant advantages. The words "all or part of the property or thing or of the proceeds" have been designed to apply to situations where dirty money has been mingled with other funds which are "clean."³² The concept of "wilful blindness" and the "doctrine of recent possession" are both of great assistance to the Crown in proving the essential element of knowledge on the

31. Regina v. Nimbus News Dealers and Distributors Ltd. (1970) 11 C.R.N.S. 315--Ontario Provincial Court.

32. Item 19, Recommendations of Uniform Law Conference, 1974.

part of the accused.³³ The special evidentiary provisions contained in section 317 (permitting proof that the accused has been, within the preceeding 12 months, in possession of stolen property other than the subject of the prosecution) and section 318 (permitting proof of previous convictions for theft or under section 312) can be of assistance to the Crown in proving guilty knowledge in certain circumstances.

While some of the provisions just mentioned might ease the task of the Crown when it is dealing with the laundering of funds which have been stolen, most of these special provisions will not apply to the laundering of funds obtained from some other criminal activity. Sections 317 and 318 cannot apply, for example, to funds obtained from bookmaking, manufacturing of narcotics, or pimping. It is unlikely that the doctrine of recent possession could apply to these latter offences in order to assist the Crown in proving knowledge by the accused of the tainted origin of the monies.³⁴

(G) THE RULE AGAINST PROOF OF MULTIPLE CONSPIRACIES

Many of the most important prosecutions concerning enterprise type crimes are cases of conspiracy. Largely for historical reasons, the common law definition of conspiracy has evolved in a somewhat different manner from the definition of other crimes. A number of special rules of evidence apply to conspiracy charges only; many prosecutors see certain tactical advantages in a conspiracy charge and attempt to lay one if the fact situation will possibly support it.

There is one obscure but important rule which can have a serious and detrimental effect on a conspiracy prosecution. This is the so-called rule

33. As to wilful blindness, see R. v. Hart (1973) 21 C.R.N.S. 44--BCCA; as to the doctrine of recent possession, see Regina v. Hodd (1971) 15 C.R.N.S. 249--SCC, and see Regina v. Graham (1972) 19 C.R.N.S. 117--SCC.

34. R. v. Ferrari et al (1972) 17 C.R. 45--Ontario Provincial Court; DPP v. Nieser (1958) 43 CR. APP. R. 35, 45.

against proof of multiple conspiracies, which holds that where a single conspiracy is alleged but the evidence (almost always circumstantial in nature) is as consistent with a number of limited conspiracies as with the existence of one overall conspiracy, then the charge is "multifarious" and all accused persons must be acquitted.³⁵ This is a complicated and highly technical subject which contains many pitfalls for the unwary. Recent court cases may have softened the impact of the rule somewhat, but at the time of writing the problem remains a real one.³⁶ By operation of this rule, it is entirely possible for the Crown to charge several people with conspiracy to import narcotics, to prove that each individual accused committed one or more acts of importing in cooperation with one or more of his co-conspirators, and still lose the case. This unfortunate result will occur whenever the evidence appears to show not one overall agreement adhered to by all accused persons, but two or more separate agreements each of which is adhered to by only some of the accused.³⁷

In practice, it is usually difficult and sometimes impossible to anticipate such a result in advance. This is because proof of a conspiracy is seldom made by direct evidence, but rather is built up piece by piece out of a large quantity of circumstantial evidence. Reasonable men may draw slightly differing inferences from large quantities of circumstantial evidence, and one judge might infer two separate agreements from a certain set of facts where another judge would infer only one. The ultimate effect of the rule against proof of multiple conspiracies is to greatly weaken the conspiracy charge as a potential weapon against enterprise crime.

35. See R. v. MacDonald and eight others (1963) 10 C.C.C.(2d) 488 - BCCA - and cases cited therein.

36. Recent cases concerning the rule against proof of multiple conspiracies include R. v. Cotroni and Papalia (1979) 7 C.R.(3d) 185 - SCC; and Regina v. Burns (unreported) Nov. 9, 1979 - Vancouver County Court.

37. This was the result in Regina v. Burns, supra.

IV. THE STATE OF EXISTING CIVIL REMEDIES IN CANADA

(A) REGULATORY AGENCIES

Every legitimate business is invariably confronted with a plethora of regulations that require the business, or its principals, to file certain documents and obtain certain licences.¹ Because the criminal law is lacking in effective mechanisms to curtail the use and acquisition of legitimate businesses by persons involved in criminal activities, the researchers explored the possibility of using regulatory controls as an alternative to the criminal process in this respect. The conclusion was quickly reached that, although regulatory agencies can play a useful role in combating "infiltration" by aiding the Attorney General and his officers, in isolation they can do little to prevent, restrain, or penalize the acquisition and use of legitimate business by criminals.

1. Provincial and Municipal Agencies:

The researchers examined the disclosure requirements,² investigatory procedures,³ and statutory powers of three agencies that would be directly

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1. In the United States, "Studies have shown that the average state requires a license for one hundred different occupations and professions.": Publication by National Association of Attorneys General, Committee on the Office of Attorney General, "The Use of Civil Remedies in Organized Crime Control," Dec. 1975.
 2. These varied from agency to agency, and in the case of the Vancouver City Licensing Department, from occupation to occupation. Generally, the greater the potential for public harm or criminal activity, the greater the degree of disclosure required. The City Licensing Department requires a police check for such activities as taxi drivers, home repair contract companies, secondhand dealers, and so on. The Liquor Administration Board requires a ten-year work and employment history, and the Superintendent of Brokers office requires a 15-year work and employment history and additional information on the expected share holdings and sources of funds.
 3. The Superintendent of Brokers office and the Liquor Distribution Branch each have their own investigators but both agencies also rely on the police for background checks and ongoing information on licence holders.

associated with many of the businesses commonly used and acquired by persons involved in criminal activities: the British Columbia Liquor Distribution Branch⁴, the British Columbia Superintendent of Brokers⁵ and the City of Vancouver Department of Licences and Permits.⁶ These three were chosen as representative, in a general way, of such agencies across Canada. Powers granted to such agencies tend to differ little from province to province. The main points of interest to the researchers were the thoroughness of the background check, the relevance of past sources of income, and the grounds upon which a licence would be denied or revoked. Inquiries were made as to the agency's course of action if an applicant was suspected of fronting for a criminal, if a police report disclosed that the applicant was "criminally associated," or if the applicant had no obvious source of income with which to begin or conduct the relevant business venture. The answers to these inquiries revealed that, in general,⁷ the "rules of natural justice",⁸ by

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4. Cabarets, bars and restaurants are popular acquisitions for persons who have been involved in crime. Not only can these serve as convenient fronts for other illegal activities (such as drug dealing), but they can also be used to launder money.
 5. The Superintendent of Brokers Office examines disclosure documents concerning the public distribution of securities to ascertain that they fairly disclose what the law requires and are not part of a fraudulent scheme.
 6. The City Licensing Department issues business licences for all businesses operated within the City limits.
 7. The Liquor Distribution Board may refuse to issue an application where "in the opinion of the general manager, it would be contrary to the public interest to do so." (Section 16(2) of Liquor Control and Licensing Act, R.S.B.C. 1975, C. 38). These are somewhat easier grounds upon which to deny a licence, because the denial can be dissociated from the individual. But the rules of natural justice must still be adhered to, and there are appeal provisions.
 8. The "rules of natural justice" in administrative law include the right to a fair hearing and the right to appeal a decision. Unless specifically exempted by statute, the Judicial Review Procedure Act, R.S.B.C. 1976, C. 25, sets down appeal procedures for such cases in British Columbia.

which all administrative agencies are governed, effectively prohibit the revocation or denial of a licence unless the applicant has been convicted of a fairly recent criminal (or in some cases, provincial)⁹ offence, or is conducting his business in violation of the agency's governing statute. The requirement for reasons to be given¹⁰ and the existence of appeal procedures¹¹ prevent the agency from denying a licence in most other cases.¹²

The Superintendent of Brokers requires disclosure of the fact that an applicant is merely a nominee or agent of someone else,¹³ but the existence of this relationship does not preclude the granting of a licence. The other agencies do not inquire, and do not have the resources to check, whether the applicant is fronting for someone else. The Superintendent of Brokers asks about sources of funds¹⁴ but lacks the resources to verify the truth of what he is told. (In any event, a knowledgeable applicant can easily frustrate any investigation as to the source of funds by taking advantage of bank secrecy laws in another jurisdiction¹⁵ and declaring the source of funds as a "loan" from a foreign corporation.)

9. E.g., Liquor Control and Licensing Act, s. 16(1); Municipal Act, R.S.B.C. 1960, C. 255, s. 458; Vancouver Charter, R.S.B.C. 1960, C. 55, s. 277.

10. E.g., Liquor Control and Licensing Act, s. 22. Even if not specifically provided, the existence of appeal procedures presupposes that reasons be given. See note 11.

11. Liquor Control and Licensing Act, s. 36, Securities Act, s. 30, Vancouver Charter, s. 277, and note that even when not specifically provided for by statute, the Judicial Review Procedure Act will allow appeal on "a statutory power of decision"--which includes the decision on the eligibility of a person to receive, or to continue to receive, a license. (s. 1).

12. Police officers would naturally be reluctant to reveal "suspensions" in an open administrative hearing.

13. Form 4 under the Securities Act, R.S.B.C. 1967, C. 45, prescribed by B.C. Reg. 469/76, question #23.

14. Ibid., question #24.

15. See earlier discussion on the "laundering" of funds.

Although many agencies have their own investigators, limited resources¹⁶ mean that law enforcement agencies must be relied upon to a great extent. For example, checks on the background of the applicant are done by the police. These background checks may be a low priority for police departments, and the agency may not know how thoroughly the applicants have been investigated. Furthermore, even the lack of a criminal record cannot be confirmed by the police unless they have access to fingerprints. (The taking of fingerprints as a requirement for the issuance of a liquor licence would probably give rise to objections based on the civil liberties of the applicant.) Another limitation is that there is no procedure that would ensure the relevant agency is notified if a licence holder is convicted of a criminal offence after the background check has been completed, especially if the offence occurred in a different jurisdiction in Canada. Finally, regulatory agencies cannot penalize to any extent: although a breach of their legislation is usually a summary conviction offence, and a false application form may give rise to a fraud charge, in general, regulatory agencies can do little more than grant or revoke licences.

For the above reasons, little more can be done by the agencies than is done at present. However, a significant improvement in law enforcement intelligence gathering in the area of legitimate business could be made with improved coordination between agencies and the police. For example, computerization of information on compatible systems would be extremely useful. It is difficult to obtain relevant information on the legitimate business holdings of a known criminal, and it is clear that no one agency can provide the police with all the necessary information. However, effective coordination and a compatible computer system would allow for exchange of public information between

16. The problem of limited resources has been solved by the State of Nevada Gaming Control Board. They require applicants to pay the cost of their own investigation, according to a talk given to members of the Co-ordinated Law Enforcement Unit in Vancouver, B.C., in March, 1980, by James Rosser and William Savage, investigators with the Board.

agencies, considerably expanding intelligence capability in this area.¹⁷ If a statute similar to R.I.C.O. is adopted in Canada, such expanded capability will be important.¹⁸

2. Income Tax Assessments:¹⁹

The researchers did not study the use of federal regulatory agencies to combat the infiltration of legitimate business, but it is necessary to mention one federal bureaucracy that has a large effect on the activities of enterprise crime--Revenue Canada Taxation. Through taxation, this office can confiscate some of the illicit profits made by some criminals. Because confidentiality is mandated by the Income Tax Act, the program under which this is done cannot be analyzed in any detail, but it is administered by a special branch of the Royal Canadian Mounted Police, in cooperation with Revenue Canada Taxation. It works in two ways. The first involves a complete investigation of the financial affairs of individual criminals to determine the location and worth of all assets owned by them. At the conclusion of the investigation this information is used to determine the criminal's "net worth" which, in turn, forms the basis of an income tax assessment, issued by Revenue Canada Taxation. Assets belonging to the criminal can be seized and eventually sold to meet this assessment. The second way the program works is through "jeopardy assessments." These are assessments issued to cover specific assets

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17. Another related aspect for further study, and an important one, is the question of the granting of government contracts. Concern was expressed to us over the granting of lucrative contracts to corporations that might be corruptly influenced, often by large criminal syndicates in the United States. The existence of such contracts may reveal a lack of communication between government agencies and police intelligence agencies.
 18. An increased emphasis will be put on gathering information on the financial and business affairs of an individual. The following section on the Statute will clarify this.
 19. All statistical and factual information contained in this section was provided to the researchers in private conversations with Staff Sgt. Ernie Brydon who is the N.C.O. in charge of Special Projects with the Royal Canadian Mounted Police, Commercial Crime Section, Vancouver, B.C.

that come to the attention of police during criminal investigations for other matters. Normally, a jeopardy assessment is issued when an accused is arrested in possession of a large amount of cash that cannot be linked to the criminal transaction with which he is, or will be, charged. In these cases, it is possible to "freeze" the cash and issue a tax assessment for its amount.

All assessments are appealable. However, a reverse onus situation applies, so that a criminal must disprove the amount of the assessment by proving that the assets do not belong to him, that they were acquired by way of a non-taxable gift or inheritance, or that they were valued incorrectly.

This tax program began in 1973. Since that time, more than \$39 million has been assessed by Revenue Canada Taxation against criminals in this country. (This figure includes assessments, interest, penalties and court fines up to December 31, 1979). It was not possible to obtain a province by province breakdown of assessments under the program, but, according to the R.C.M.P. in British Columbia, criminals who were the subjects of their attention under this program in 1979 were collectively liable for income tax assessments of \$3.958 million. For the first six months of 1980, the comparable figure is \$3 million.²⁰ This latter figure represents the estimated income of fewer than 200 individuals. It also represents the investigatory work of only 11 police officers. The researchers expect that comparable results would be found in most provinces, especially in Ontario, Quebec and Alberta.

Figures such as these prove two things: first, that crime can be a profitable business; second, that it is not impossible to trace asset ownership to criminals.

The tax program has worked well. It is sometimes rumoured that criminals are more upset by the loss of their money than by the prison term to which they

20. These figures are not necessarily representative of the total amount of actual assessments issued by Revenue Canada in British Columbia over this time, but represent the amount that the R.C.M.P. consider to be provable if an assessment were issued. Revenue Canada determines the amount of the assessment and there are a number of legitimate factors that may result in their lowering an amount arrived at by the R.C.M.P.

were sentenced. However, the income tax program attempts to do by indirect means what the law should, in our opinion, permit to be done directly: confiscate the profits of crime. By using the provisions of the Income Tax Act, only a percentage (the applicable tax rate) of the accused's illegal income is seized, and because the Income Tax Act is not specifically designed to deal with criminals and illicitly obtained wealth, the seizing provisions are not always ideally suited to situations that arise.²¹ In the opinion of the researchers, the tax program serves a useful purpose, but there are many cases that could be more successfully concluded if the law provided for the forfeiture of ill-gotten gains.

(B) CIVIL SUITS

It is tempting to suggest that an effective attack on enterprise crime of certain kinds could be made through the medium of a civil suit. The Crown as plaintiff in a civil suit enjoys certain distinct advantages which it lacks in a criminal prosecution. The defendant in a civil case is compelled to submit to examination for discovery and his evidence given there may be read into the record at trial. The defendant may himself be called as a witness by the plaintiff at trial. A refusal to be sworn or to answer questions constitutes a contempt of court, punishable by imprisonment. Certain other discovery procedures, such as the discovery of documents, also provide the Crown with weapons not available in a criminal case. The burden of proof in a civil case is, of course, lighter and it is easier to amend pleadings than it is in a criminal case.

These potential advantages are so powerful that they might well make up for the fact that the result of a civil suit (i.e., an injunction restraining certain behaviour and/or monetary damages) does not involve incarceration. However, it would appear that the potential for the use of civil suits against

21. For example, to freeze assets under a jeopardy assessment, where time is usually of the essence, can take up to 48 hours, according to Staff Sgt. Brydon.

criminal enterprises is severely restricted. Professor John Horn²² has provided us with his opinion (the full text of which is appended hereto) that "If the Attorney General deliberately chose to use civil process for the purpose of obtaining an advantage denied by the use of criminal process then such use might well be thought to be an abuse."

At common law, an injunction was and is available at the suit of the Attorney General for the purpose of suppressing or abating a "public nuisance" or enjoining a breach of a statute where "public rights" are involved. Examples of a "public nuisance" include the conducting of a house of prostitution, while an example of a breach of a statute where a "public right" is involved is the carrying on of a cartage business without a licence.²³ But, as Professor Horn points out, "the courts are unlikely to move further than they already have in the direction of granting injunctions against threatened conduct constituting a crime."²⁴

There is no principle of common law that property or profits obtained through crime are liable to forfeiture.²⁵ While a private individual who has been injured through the tortious conduct of a person who commits a crime may sue for damages, there is no apparent theory under which the Attorney General could sue on his behalf.

22. B.A., LL.B. (Capetown), Partner in the law firm of Sproule and Horn, Nanaimo, B.C. At the time of the preparation of this opinion Mr. Horn was Practitioner in Residence at the Faculty of Law, University of Victoria, B.C. (for the academic year 1979-80). He is co-author of the book, Fraser, Peter and Horn, John, The Conduct of Civil Litigation in British Columbia. (Butterworth's, Toronto, Ontario, 1978).

23. Attorney General for Ontario v. Grabarchuk (1976) 11 O.R. 607; Attorney General v. Premier Line Ltd. [1932] 1 Ch. 303.

24. Appendix B, page 9.

25. Ibid., p. 4.

With regard to corporations in British Columbia, the Attorney General may institute an action for annulment of the charter of the corporation on the grounds that the corporation (among other things) is "misusing a franchise or privilege conferred upon it by law." Upon forfeiture of the charter, the real and personal property of the company escheats to the Crown.²⁶ Professor Horn has pointed out that isolated cases of abuse or misuse are unlikely to be sufficient; a general policy of misuse or abuse must be shown.²⁷

In conclusion, neither the existing framework within which regulatory agencies must operate, nor the common law doctrines giving rise to civil liability, are likely to provide the Crown with any significant weapons in its struggle against enterprise or organized crime.

26. Crown Franchises Regulations Act, R.S.B.C. 1960, C. 88. (Crown Franchise Act, R.S.B.C. 1979, C. 85.)

27. Appendix B, page 6.

V. THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS STATUTE

(A) HISTORY OF THE STATUTE¹

The Racketeer Influenced and Corrupt Organizations Statute was enacted in 1970, as part of the Organized Crime Control Act of 1970.² A brief examination of the events that led to the passing of this Act will provide the background necessary to discuss the "R.I.C.O." Statute.

Criminal syndicates became firmly entrenched in United States society during Prohibition, and they thrived and prospered while the nation's resources and attentions were focused on the problems posed by the Depression and the war. During these years, the syndicates organized themselves territorially and expanded their range of activities, favouring lucrative and low-risk crimes such as gambling, loansharking, and prostitution. They emerged as cohesive, sophisticated, profitable and powerful groups, posing a far greater threat to society than the earlier "bootlegging" operations.

In 1950, a National Conference on Organized Crime was convened by the U.S. Attorney General after receiving complaints from local government and law enforcement leaders about a lack of effectiveness in dealing with the syndicates, especially where gambling was concerned. This conference prompted Tennessee Senator Estes Kefauver to propose a legislative committee to examine the problem of organized crime on a national scale.³ The Senate Select Committee to Investigate Organized Crime in Interstate Commerce, chaired by

1. Most of the information contained in section (A) came from: United States National Advisory Committee on Criminal Justice Standards and Goals, Organized Crime: Report of the Task Force on Organized Crime (Washington, D.C. 1976) pp. 15-16.

2. Pub. L. 91-452.

3. Speech by Lynch, William, "History of the Federal Strike Force Program", reprinted in the United States, Department of Treasury, Criminal Investigator Training Division Manual: Compendium on Organized Crime (6/77), pp. 20-21.

Senator Kefauver, was thus established. Little legislative change flowed directly from these hearings,⁴ but they brought the extent of organized criminal activities to the attention of the public,⁵ and sparked other studies in states and cities most affected by the syndicates.

In 1957, two seemingly unrelated events combined to focus the public's attention on organized crime once again. The first was the Senate Select Committee on Improper Activities in the Labour or Management Field, under the direction of Senator John L. McClellan of Arkansas.⁶ This investigation revealed extensive criminal penetration of labour unions and businesses. The second was the now famous "Apalachin Gathering" - a meeting attended by more than 70 criminal syndicate leaders from all parts of the United States.⁷ Although the agenda of this meeting was not deduced until years later, the gathering itself emphasized the magnitude of the problem.

In 1961, Robert F. Kennedy became Attorney General, bringing with him years of experience as chief counsel to the McClellan Committee. Under Kennedy's

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4. The Kefauver Committee was responsible for "the passage of the wagering and occupational stamp taxes that put Treasury into the enforcement of the largest source of revenue to organized crime.", *ibid.* p. 21.
 5. The hearings were televised, at a time when television was becoming a popular medium.
 6. Subsequently Senator McClellan proposed the Organized Crime Control Act P.L. 91-452 (s. 30) which contained the R.I.C.O. Statute. Chief counsel for the Committee was Robert F. Kennedy, who was later to become Attorney General.
 7. The men who attended this meeting were found to have been charged with a variety of offences from narcotics offences to murder. They also represented legitimate business interests in garment manufacturing, trucking, vending machines, taverns and restaurants, automotive agencies, olive oil and cheese, liquor wholesaling, funeral homes and labour or labour-management relations. Several of the crime bosses who attended this meeting were questioned by the McClellan Committee in 1958. Source: Speech by William S. Lynch, *supra*, note 3, and United States, President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (E.P. Dutton and Co. Inc., N.Y. 1968) p. 445.

administration, the existence of a nationwide criminal confederation was confirmed when Joseph Valachi broke the code of silence of La Cosa Nostra⁸ by describing its inner workings on television.

The above events, combined with a general concern over increasing criminal activity of all types, led to the formation of the President's Commission on Law Enforcement and Administration of Justice in 1965. This Commission completed its report in 1967, devoting one chapter and a supporting task force report to organized crime. The Commission made 22 recommendations dealing with proof of criminal violations, investigation and prosecution units, crime investigation commissions and noncriminal controls. Two Acts, the Omnibus Crime Control and Safe Streets Act of 1968⁹ and the Organized Crime Control Act of 1970¹⁰ were subsequently enacted as a result of the Commission's work. Between them, these two acts incorporated into federal law all eight of the Task Force recommendations on proof of criminal violations.

The 1968 Act enacted the Federal wiretap law and established the Law Enforcement Assistance Administration.¹¹ The 1970 Act was comprised of several parts which:

- Provide for the establishment of special grand juries in localities where there are major organized crime operations. These grand juries have expanded power to control the duration of their terms and the right to appeal any arbitrary termination. They also may issue reports recommending

8. "La Cosa Nostra" means "This thing of ours" in Italian. It is now commonly accepted as the name given the Mafia by its members.

9. 42 U.S.C. 3701.

10. Pub. L. 91-452.

11. The Law Enforcement Assistance Administration funds organized crime control and prevention programs. It assists State and local governments to build special units to combat organized crime, including state organized crime prevention councils, the recruiting and training of special investigative and prosecutive personnel and the development of information systems. It also funds research into areas of organized crime. (Source: Speech by Richard W. Velde, reprinted in Compendium on Organized Crime (supra note 3) p. 106.)

removal of any public officer or employee for noncriminal misconduct involving organized criminal activity and report concerning organized crime conditions in their districts;

- Establish a general federal immunity statute under which witnesses can be ordered by a court to testify in return for immunity from prosecution and can be jailed for up to 18 months if they refuse to do so. Witnesses are given "use immunity" rather than the "transactional immunity" provided for in legislation that the 1970 Act supersedes. "Use immunity" forbids the use of information derived from testimony while the witness is under court order to testify, but does not protect him from prosecution for acts about which he testified if evidence is developed entirely independently;

- Provide for perjury prosecution when a witness knowingly makes a false statement under oath or makes two sworn statements that are completely contradictory;

- Provide protection for witnesses in organized crime cases and for members of their families. Federal officials are authorized to provide secure housing and otherwise assure the safety of witnesses;

- Provide for the taking and use of pretrial depositions "whenever due to exceptional circumstances it is in the interest of justice";

- Expand federal jurisdiction over illegal gambling operations because it "involves widespread use of, and has an effect upon, interstate commerce...";

- Provide for extended sentences for persons convicted of participation in continuing illegal businesses or who are habitual criminals, chief participants in conspiracies or repeat offenders.¹²

The purpose of the Organized Crime Control Act is "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with unlawful activities of those engaged in organized crime."¹³

12. Report of the Task Force on Organized Crime (1976), supra note 1, p. 18.

13. Pub. L. 91-452, Section 1.

In addition to the provisions set out above, the Organized Crime Control Act enacted an innovative piece of legislation that did not form part of the Task Force recommendations.¹⁴ This Act is the Racketeer Influenced and Corrupt Organizations Statute, commonly referred to as the "R.I.C.O." Statute.¹⁵

(B) THE STATUTE

The R.I.C.O. Statute is based on American anti-trust law.¹⁶ Prompted by concerns expressed by the Kefauver Committee, the Senate Select Committee on Improper Activities in the Labour or Management Field, and the President's

14. For a detailed description of R.I.C.O.'s legislative history, see Blakey, G.R., "Criminal Overview of R.I.C.O." in Techniques in the Investigation and Prosecution of Organized Crime: Materials on R.I.C.O. (Cornell Institute on Organized Crime, 1980) Volume 1, page 1 @ 8-12; and Mann, Toby D., "Legislative History of R.I.C.O." in the same materials at p. 58.

15. 18 U.S.C. 1961-1968.

16. The application of anti-trust principles to organized crime was described by the President of the United States in his message on organized crime delivered April 23, 1969:

"The injunction with its powers of contempt and seizure, monetary fines and treble damage actions, and the powers of a forfeiture proceeding, suggest a panoply of weapons to attack the property of organized crime--rather than the unimportant persons (the fronts) who technically head up syndicate-controlled businesses. The arrest, conviction and imprisonment of a Mafia lieutenant can curtail operations, but does not put the syndicate out of business. As long as the property of organized crime remains, new leaders will step forward to take the place of those we jail. However, if we can levy fines on their real estate corporations, if we can seek treble damages against their trucking firms and banks, if we can seize their liquor in their warehouses, I think we can strike a blow at the organized crime conspiracy."

Crime Commission about the effects of the investment of dirty money in legitimate businesses, two bills were proposed in 1968 to deal with this investment.¹⁷ One of the bills was simply an amendment to the anti-trust law¹⁸ making the investment of unreported income an unlawful trade practice.

The other was a separate piece of legislation, paralleling the anti-trust statute, prohibiting the investment of money derived from certain types of criminal activities. These two bills were merged, amended, expanded and refined as they went through the legislative process. The resulting legislation, the R.I.C.O. Statute, was eventually brought forward in conjunction with legislation proposed by the Task Force on Organized Crime and subsequently enacted as Title IX of the Organized Crime Control Act of 1970. Although the legislation retained its anti-trust character, it was a very different piece of legislation than that which was originally proposed.

The scope and intent of the other titles of the Organized Crime Control Act can be easily discerned by examining the Task Force Report. However, the R.I.C.O. Statute, which has now emerged as an extremely powerful and versatile piece of legislation, took a different legislative path from the other titles and was considerably altered as it progressed along that path. The intended limits of its application have, therefore, provoked a substantial amount of controversy. Although it is written very broadly, many writers and Courts have, on the basis of its legislative history, attempted to limit its application to situations where a legitimate business (as opposed to an unlawful or illegal business) is used or acquired in violation of the Statute¹⁹, and its forfeiture provisions to the accused's holdings in

17. S. 2048 and S. 2049, 90th Congress, 1st Session (1967) were introduced in the Senate by Senator Hruska. H. 11266 and H. 11268, 96th Congress, 1st Session (1967) were introduced in the House by Congressman Poff.

18. Sherman Act s. 4, 15 U.S.C. s. 4 (1970).

19. See, for example, U.S. v. Sutton et al, unreported, U.S. Court of Appeals (Sixth Cir.) Nos. 78-5134-5-6-7-8-9-41-2-3, (Decided and Filed September 4, 1979). See later discussion in this paper on the meaning of the word "enterprise."

legitimate business enterprises.²⁰ These conclusions are not unreasonable in view of the origins of the Statute and the great emphasis placed on organized crime's "infiltration of legitimate business" while the hearings were in progress in the House of Representatives.²¹

For example, Hon. John L. McClellan,²² co-sponsor of the R.I.C.O. Statute, when speaking of the need for such legislation, emphasized the "frightening" dangers posed to society by organized crime involvement in legitimate business.²³ Attorney General John Mitchell expressed similar concerns,²⁴ as

20. See, for example, U.S. v. Maurabeni American Corporation and Hitachi Cable Ltd., unreported, U.S. Court of Appeals (9th Cir.) No. 79-1327 (Filed Jan. 10, 1980). See later discussion in this paper on the forfeiture provisions.

21. For an in-depth analysis of this argument see: "Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for 'Criminal Activity'", 124 University of Pennsylvania Law Review, 192 at pp. 204-5.

22. United States Senator from the State of Arkansas. See also McClellan, "The Organized Crime Act (s. 30) or Its Critics: Which Threatens Civil Liberties?" 46 Notre Dame Law Review 55 (1970) at p. 140, for an explanation of the provisions of the R.I.C.O. Statute written by Senator McClellan. Senator McClellan was Chairman of both the Government Operations Committee and the Criminal Laws and Procedures Subcommittee. He presided over the televised 1963 hearings at which Mafia defector Valachi first revealed publicly the inner workings of what he called "this second government", known to its members as "La Cosa Nostra."

23. "Internal Revenue Sources have revealed that among the 113 major organized crime figures in America, 98 are involved in 159 businesses. Among the business interests held by organized crime leaders are controlling interests in one of the largest hotel chains in America, a bank with assets of 70 to 90 million dollars, and a laundry business grossing 20 million dollars annually. Of all the dangers posed by organized crime to our society, this seems somehow one of its most frightening." (House Hearings, p. 106.)

24. "Over the last four decades, a criminal minority has put together in the United States an organization which is both an illicit cartel and a nationwide confederation, operating with comparative immunity from our criminal laws, and in derogation of our traditional concepts of free enterprise. This confederation, formerly known as the Mafia, but more recently identified as La Cosa Nostra, owns or controls many illicit businesses in the United States, and is rapidly increasing its substantial interests in legitimate commerce and industry..."

did others at the House of Representatives²⁵ and in the Senate.²⁶ Examples of criminals in legitimate business were given in support of the legislation²⁷ and the legislation's sole purpose was represented as an attempt to deal with the taking over, and use of, legitimate businesses by organized crime.²⁸ It is therefore hardly surprising that there have been many attempts to limit the Statute's application to cases where legitimate businesses are involved.²⁹

24. (cont.)

"In the past decade, the Cosa Nostra has invested a substantial portion of its income in a whole realm of small and middle-sized legitimate businesses. It has transferred to the legitimate field of business the same strong-arm practices which have proved so successful in the past. A manufacturer who will not use a syndicate-owned trucking firm finds his life in danger or his family threatened. A bar or restaurant operator who will not rent a syndicate-owned jukebox finds that his waiters go on strike. A grocery store owner who will not buy a syndicate-controlled line of imported food may be burned out. Furthermore, in its legitimate business enterprises, organized crime frequently demands a higher price for its goods and services than is generally obtainable on the open market, and provides a lower quality of products."
(House Hearings, pp. 152-3.)

25. See, for example, the submission of Aaron Kohn, Managing Director of the Metropolitan Crime Commission of New Orleans, House Hearings, page 433.

26. United States, Senate Committee on the Judiciary, Report on Organized Crime Control Act of 1969, s. Rep. No. 617, 91st Cong. 1st Sess. 161 (1969), at 76-83, 159.

27. House Hearings, p. 433-436.

28. For example, "Title IX is designed to inhibit the infiltration of legitimate business by organized crime, and, like the previous title to reach the criminal syndicates' major sources of revenue..."

The proposal appears to cover most of the methods through which La Cosa Nostra customarily infiltrates and operates legitimate business enterprises..." (Attorney General Mitchell, House Hearings, pp. 170-2)

and:

"Title IX of S. 30 is designed to prevent organized criminals from infiltrating legitimate commercial organizations with the proceeds of their criminal activities or with violent and corrupt methods of operation, and to remove them and their influence from such enterprises once they have been infiltrated." (Senator McClellan, House Hearings, p. 106).

29. See subsequent discussion herein on this aspect.

During the course of our research, we had the opportunity to discuss the legislation and its history with Professor Bob Blakey³⁰ (who was instrumental in drafting the final legislation and accompanied Senator McClellan to the House hearings.³¹) Professor Blakey stated that a deliberate choice was made to illustrate the potential of the statute during the House hearings by concentrating on the infiltration of legitimate business. It was not intended, he said, that the final version of the Statute be limited to offences where a legitimate business is involved. Professor Blakey regrets the use, in judicial decisions, of the House and Senate hearings to limit the Statute's application in this way. He explained to us that the Act was drawn widely to cover all types of enterprises, legitimate or illegitimate. The Organized Crime Control Act contains a section providing for liberal construction in favour of the government³², and this section was meant to avoid the type of situation that has resulted.³³ The word "enterprise" was meant to be an all-encompassing term, to include everything from corruptly used legitimate businesses and "joint venture" criminal conspiracies, to "La Cosa Nostra" crime syndicates.³⁴

Although there are difficulties in determining the extent to which the Statute was meant to apply, it is clear that Congress was concerned about the effect of organized criminal activities on the nation's economy. The Statute creates

30. Professor, Cornell Institute on Organized Crime, Ithaca, N.Y. At the time of the passing of the Organized Crime Control Act, Professor Blakey was Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures, the Subcommittee that proposed the Act. (p. 81, House Hearings).

31. House Hearings, p. 81.

32. Section 904 of Pub. L. 91-452 provided that:
 "(a) The provisions of this title shall be liberally construed to effectuate its remedial purposes."

33. The liberal construction clause is not really of much help, though, because it simply dictates that the statute shall be construed liberally to effectuate its purposes. The whole basis upon which the statute is sought to be limited is that its purpose is to counteract the infiltration of legitimate business.

34. Private interview with Professor Blakey, Feb. 25, 1980, Ithaca, N.Y.

several new offences, and provides substantial criminal penalties, including mandatory forfeiture of interests acquired in violation of the Act. In addition, the Statute enacts many of the civil remedies that are part of anti-trust law. The analogy to anti-trust cases recognizes the monopolistic, territorial nature of organized crime, and the fact that organized crime is simply an illegal business, existing solely for financial gain.

(1) Definitions

Although the provisions of the R.I.C.O. Statute are aimed at members of organized crime,³⁵ the words "organized crime" do not appear in the Statute itself. The lack of these words evinced a desire to avoid defining this amorphous term,³⁶ as well as a recognition of the danger involved in aiming a

35. Section 1 of Pub. L. 91-452 provided in part that:

"The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loansharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact."

36. There is no universally accepted definition of the phrase. See Appendix 1 of 1976 Task Force Report (supra, note 1) entitled "Definitions of Organized Crime" and Blakey, G.R., Goldstock, R. and Rogovin, Charles H., Rackets Bureaus: Investigation and Prosecution of Organized Crime (U.S. Govt. Printing Office 1978), at p. 110, for legal uses of the phrase in the United States.

statute at a "class" of people.³⁷ The drafters avoided these problems by proscribing a specific type of criminal behavior: a pattern of racketeering activity related in some way to an enterprise.³⁸ Before discussing the offences and penalties contained in the Statute, it is necessary to look at the meaning of these crucial terms.

a) "Pattern of Racketeering Activity":

The definition of "racketeering activity" is a specific list of crimes³⁹

7. To do so would be providing for a "status crime", which is foreign to the usual principles of criminal liability and would provoke litigation on who was included in the definition. It is worthy of note that, although the Statute does not use the phrase, it has been argued that the Statute nonetheless is limited in its application to members of "organized crime." U.S. v. Mandel 415 F. Supp. 997 (1018-19) (D. Md. 1976); U.S. v. Amato 367 F. Supp. 547, 548 (S.D.N.T. 1973). This argument has not succeeded, except in one case that is easily distinguishable: Barr v. Wui/Tas, 66 F.R.D. 109, 113 (S.D.N.Y. 1975).

8. The specific crimes are dealt with in a later section. A complete copy of the Statute is appended hereto.

9. S. 1961 reads in part as follows:

"As used in this chapter

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 16, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses),

thought to be typical of organized crime.⁴⁰ "Pattern" of racketeering activity, however, is not specifically defined by the Statute. Section 1961(5) reads:

"pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

The lack of a concrete definition of the word "pattern" has caused the courts some difficulty. One line of authority holds that something "more than

39. (cont.)sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;..."

40. House Hearings, p. 170 (Attorney General Mitchell). Objections were taken to the broadness of the definition by the American Bar Association:

On the one hand, the crimes listed as "racketeering activity" include several categories which are plainly beyond the intention of the Senate Committee, as expressed in the Report, and which should not, in our view, be subjected to the severe penalties of Title IX. The Senate Report states: "'Racketeering activity' is defined in terms of specific State and Federal criminal statutes now characteristically violated by members of organized crime." Senate Report 34. This statement is not supported, however, by the language of the statute, which includes as racketeering activity such things as theft from an interstate shipment regardless of the value of the property stolen (19 U.S.C. 659),⁷¹ unlawful use of a stolen telephone credit card (18 U.S.C. 1343), the "mom and pop" variety of illegal gambling business which, as we point out above, would be covered by Title VIII (proposed 18 U.S.C. 1955), any securities fraud case, and virtually any state felony or federal misdemeanor involving drugs--which would clearly include marijuana violations. (House Hearings, p. 329).

Such objections tend to ignore the limiting effect of the words "pattern" and "enterprise," to be discussed at a later stage.

accidental or unrelated instances of proscribed behavior" is required,⁴¹ but another line, supported by academic opinion,⁴² holds that any two acts of racketeering are sufficient for a conviction. This latter line of authority suggests that the phrase has been exhaustively defined by the Statute.⁴³ This, in our opinion, is wrong.⁴⁴

A "pattern" of activity is of fundamental importance to the Statute. The fact that criminal acts form a "pattern" is precisely what differentiates the conduct from isolated similar activities and makes the conduct more reprehensible.⁴⁵ For this reason, it seems clear that something more must be required than two acts of racketeering.⁴⁶ By not defining the word "pattern", the draftsmen of the Statute made the existence of a "pattern" a question of

41. U.S. v. Stofsky, 409 F. Supp. 609, 613 (S.D.N.T. 1973): "The racketeering acts must have been connected with each other by some common scheme, plan or motive so as to constitute a pattern and not simply a series of disconnected acts." (p. 614). See also U.S. v. Moeller 402 F. Supp. 49 (1975) at 57.

42. See Novotny, David J., "Title IX of the Organized Crime Control Act of 1970: An Analysis of Issues Arising in its Interpretation," 27 DePaul Law Review 89, 109.

43. U.S. v. Parness, 503 F. 2d 430 (2d Cir. 1974).

44. The Statute reads "requires at least." These words indicate to us the minimum requirements of the phrase.

45. The Statute is aimed at individuals whose criminal activities are organized, and continuous or repetitive, because of the great harm inflicted by that type of criminal activity. Professor Blakey compares the effect that a "pattern" of criminal acts has on society to the effects on a victim of successive criminal acts. Just as a store owner who is robbed repeatedly, or a woman who is raped repeatedly, will suffer far more than would the same person if the act had occurred once, so society suffers more from repeated criminal conduct.

46. Webster's New Collegiate Dictionary defines "pattern" as "a reliable sample of traits, acts, or other observable features characterizing an individual." See also Atkinson, Jeff, "Racketeer Influenced and Corrupt Organizations", 18 U.S.C. s. 1961-68: Broadest of the Federal Criminal Statutes", 69 Journal of Criminal Law and Criminology, 1 (1978).

fact to be decided by the trial court.⁴⁷ This was a reasonable approach to take, but because of the difficulty the courts have had with the lack of a definition, it is possible that future amendments to the Statute will incorporate a concrete definition. This is the approach that has been followed by several state R.I.C.O. statutes.⁴⁸

(b) Meaning and Significance of the word "enterprise"

Like the word "pattern," the word "enterprise" is not defined exhaustively by the Statute. Section 1961(4) reads:

"enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

The word, however, is a significant one, because unless the "pattern of racketeering activity" is related in some way to an "enterprise", it is not proscribed by the statute.⁴⁹

The Courts have had little trouble in deciding that labour unions,⁵⁰

47. As a matter of prosecutorial practice, senior members of the Dept. of Justice often require as many as five acts of racketeering before they consider the evidence sufficient to take to Court, according to Ed Weiner, Strike Force 18, Washington, D.C. See Atkinson, *ibid.*, note 85 for a list of some of the "patterns" that have been found to exist in the case law.

48. See, for example, Fla. Stat. f. 943.46-464 (1977):
Sec. 2(4): "Pattern of racketeering activity" means engaging in at least two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after the effective date of this act and that the last of such incidents occurred within 5 years after a prior incident of racketeering conduct."

49. See "New Offences" section in this report.

50. I.e., U.S. v. Rubin, 559 F. 2d. 975 (5th Cir. 1977); U.S. v. Campanale, 518 F. 2d. 352 (9th Cir. 1975).

government offices,⁵¹ police departments,⁵² and foreign corporations⁵³ are included within the meaning of the term "enterprise." However, a controversy has arisen with respect to strictly illegal or criminal organizations. The controversy on whether such organizations are "enterprises" within the terms of the Statute has sparked several major court decisions. There are, at present, two distinct lines of authority.

One line of cases says that because the definition includes "a group of persons associated in fact, although not a legal entity", illegal enterprises are included.⁵⁴ Relying on the "liberal construction" clause,⁵⁵ and a landmark case brought under the civil provisions of the Statute,⁵⁶ this line of cases rejects the argument that a wholly illegitimate organization is not subject to the provisions of the Statute until it makes an attempt to legitimize its operations in some way. These courts decided that Congress could not have intended to deal with the immense profits amassed by organized crime by penalizing only the actual infiltration, or use of, a legitimate organization.

This liberal interpretation of the word "enterprise" allows the government to use the R.I.C.O. Statute as a very broad conspiracy statute. In proving the R.I.C.O. offence, the state may prove the existence of several conspiracies thus avoiding the rule against proving "multiple conspiracies" on the same

51. U.S. v. Frumento, 409 F. Supp. 136 (U.S.D.C., Penn. 1976); U.S. v. Salvitti, 451 F. Supp. 195 (U.S.D.C., Penn. 1978).

52. I.e., U.S. v. Nacrelli, 468 F. Supp. 241 (U.S.D.C., Penn. 1979); U.S. v. Brown, 555 F. 2d. 407 (5th Cir. 1977).

53. U.S. v. Parness, supra.

54. See U.S. v. Elliott, 571 F. 2d. 880 (5th Cir. 1978), and cases cited therein at p. 897.

55. See note 32.

56. U.S. v. Cappetto, 502 F. 2d. 1351 (7th Cir. 1974).

indictment.⁵⁷ In one recent case, several individuals were prosecuted successfully for what was, basically, a complex conspiracy to profit through assorted criminal activities.⁵⁸ The following passage indicates the analogy that the court made between a modern criminal organization and a legitimate business corporation:

Here the government proved beyond a reasonable doubt the existence of an enterprise comprised of at least five of the defendants. This enterprise can best be analogized to a large business conglomerate. Metaphorically speaking, J.C. Hawkins was the chairman of the board, functioning as the chief executive officer and overseeing the operations of many separate branches of the corporation. An executive committee in charge of the "counterfeit Title, Stolen Car, and Amphetamine Sales Department" was comprised of J.C., Delph, and Taylor, who supervised the operations of lower level employees such as Farr, the printer, and Green, Boyd, and Jackson, the car thieves. Another executive committee, comprised of J.C., Fecea and Foster, controlled the "Thefts from Interstate Commerce Department", arranging the purchase, concealment, and distribution of such commodities as meat, dairy products, "Career Club" shirts, and heavy construction equipment. An offshoot of this department handled subsidiary activities, such as murder and obstruction of justice, intended to facilitate the smooth operation of its primary activities. Each member of the conglomerate, with the exception of Foster, was responsible for procuring and wholesaling whatever narcotics could be obtained. The thread tying all of these departments, activities, and individuals together was the desire to make money. J.C. might have been voicing the corporation's motto when he told Bob Day "if it ain't a pretty damn good bit of money, I ain't going to fuck with it."⁵⁹

Until very recently, this liberal interpretation of the word "enterprise" was generally accepted by most courts. However, in September of 1979, the Sixth Circuit Court of Appeals (Ohio) handed down a well reasoned and logical argument in support of the opposite position, that is, that the Statute was not intended to, and does not, apply to strictly criminal organizations.⁶⁰

57. Private interview with Ed Weiner, Strike Force 18, Department of Justice, Washington, D.C.

58. U.S. v. Elliott, supra.

59. Ibid., p. 898.

60. U.S. v. Sutton, supra, note 19.

The Court bases its reasoning on a reading of the legislative history, which, as already mentioned, heavily emphasizes the intention of the statute to deal with the infiltration of legitimate business. The Court goes on to state that the word "enterprise" is made redundant by the liberal interpretation,⁶¹ and that if Congress had intended the Statute to apply to illegal or criminal organizations, it could have accomplished this by simply proscribing "patterns of racketeering activity." In accordance with its reasoning, the Court expanded the definition of the word:

"...We therefore hold that an 'enterprise' within the meaning of the statute is 'any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact' that is organized and acting for some ostensibly lawful purpose, either formally declared or informally recognized."⁶² (emphasis added)

61. Ibid. Reasons for judgment, p. 14:

"Most importantly, however, appellants' proposed construction is to be preferred over the government's because it infuses some content into each element of the crime. All of the words of section 1962(c) take on some independent significance when the statute is applied, for example, to a shop steward who conducts the affairs of his labor union through a pattern of extortion, bribery and fraud. The same cannot be said for a construction that would permit the prosecution of illegal gamblers for conducting illegal gambling through a pattern of illegal gambling or of prostitutes for conducting prostitution through a pattern of prostitution.

"In our view, the only alternative we have to accepting appellants' position on the scope of section 1962(c) is to rewrite the statute completely. To reiterate, the government's approach is unacceptable because it reads the 'enterprise' element out of the crime. In order to extend the statute to illicit enterprises of some description, and yet preserve some content for the "enterprise" element, we would be required to engraft upon the definition of 'enterprise' contained in section 1961(4) some set of standards that would serve to warn any person or group engaged in racketeering activity when they will be deemed to have embarked upon an 'enterprise' to that end." (footnotes omitted)

62. Ibid., p. 16.

Because the case runs contrary to the accepted line of authority and considerably narrows the scope of the Statute, it has been re-heard by the full Court of Appeal en banc, who have, at the present time, not delivered judgment.⁶³ It is probable that if the decision is unfavourable to the government, the case will be taken to Supreme Court.⁶⁴

(2) New Offences

The R.I.C.O. Statute creates four new offences. In simplified form, these are:⁶⁵

- using or investing, directly or indirectly, any income or proceeds of income, derived directly or indirectly from a pattern of racketeering activity or collection of an unlawful debt⁽⁶⁶⁾ to acquire an interest in, or to establish or operate, an enterprise; (Section 1962(a))
- acquiring an interest in, or control of, any enterprise through a pattern of racketeering activity or collection of an unlawful debt; (Section 1962(b))

63. Telephone conversation with Terry Lehmann, Cincinnati U.S. Attorney's Office, (Apr. 28, 1980).

64. No R.I.C.O. case has yet been heard by the Supreme Court. (May 1980.)

65. Please see the text of the Statute for the actual wording of the offences. These have been paraphrased to simplify discussion, and have left out the requisite part of each offence dealing with "interstate commerce." This requirement has to do with the American system of federalism and is not relevant to our discussion.

66. S. 1961(6) reads:

"'unlawful debt' means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate."

- being employed by, or associated with, an enterprise and participating in the conduct of its affairs through a pattern of racketeering activity or collection of an unlawful debt; (Section 1962(c))

- conspiracy to do any of the above. (Section 1962(d)).

(a) Section 1962(a): Using or Investing

This subsection, loosely referred to as the "dirty money" section, makes investing the proceeds of racketeering activity in an enterprise an offence. It was designed to penalize the legitimizing of the proceeds of crime, a process sometimes referred to as "laundering" money.⁶⁷ The subsection only has application in the limited type of case where there is an acquisition of, or investment of funds in, an enterprise. The invested funds must be derived from a pattern of racketeering activity or collection of an unlawful debt and the investing party must have participated in the predicate crimes as a principal.⁶⁸ Since accessories before and after the fact are excluded from the operation of the section, only a proportion of those who knowingly invest dirty money are subject to prosecution.

Depositing the proceeds of crime in a bank account would not be covered⁶⁹ by

67. See the previous portion of this paper dealing with laundering of funds.

68. U.S. Department of Justice, An Explanation of the Racketeer Influenced and Corrupt Organizations Statute, Fourth Edition, (unpublished) p. 4.

69. In the researchers' opinion, money on deposit at the bank could be referred to as an "investment" of that money but it could not be said that the deposit was an "interest" in the enterprise (bank), nor could it be said to be "used" in the establishment or operation of the enterprise (bank).

this section, nor would many purchases of securities in the open market.⁷⁰ The purchase of real or personal property would be covered only if the purchase was made on behalf of an "enterprise."⁷¹

Section 1962(a) has been used in very few cases⁷², and it has been largely unsuccessful in dealing with the problem at which it was aimed. Partial blame for its failure can be attributed to police and prosecutor unfamiliarity with its provisions,⁷³ but the primary problem is one of proof.⁷⁴ The R.I.C.O.

70. Section 1962(a) is qualified as follows:

"A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer."

71. See earlier discussion of the meaning of this word. In spite of the controversy surrounding the inclusion of illegal enterprises, it seems that "enterprise" in this section must mean a "legitimate on its face" enterprise, for the section does not make sense otherwise. This is the opinion of the U.S. Department of Justice, Strike Force 18, as expressed in their explanation book on R.I.C.O., supra.

72. Probably as few as eight cases under this section have actually gone to court, as opposed to more than 200 under the Statute as a whole, according to Ed Weiner, Strike Force, 18 in a private conversation, Feb. 26, 1980.

73. Ibid.

74. To prove an offence under section 1962(a), proof of the following is necessary: (a) at least two acts of "racketeering activity," (2) the acts of racketeering must form a "pattern;" (3) money invested or used must be derived from those acts of racketeering, (4) the actual investment or use of the proceeds (5) in an "enterprise" within the meaning of the Act. Some writers have argued that the government must also prove the mental element involved in the knowledge that the money invested came from racketeering. See: "Investing Dirty Money, Section 1962(a) of the Organized Crime Control Act of 1970," 83 Yale Law Journal (1974), 1491-1515.

Statute contains no investigative aids or legal presumptions to assist in proving offences under section 1962(a).⁷⁵

Aside from the obvious undesirability of enacting a largely unprovable crime, the main problem with section 1962(a) is that its unworkability has reflected on the Statute as a whole. Placing this novel subsection first on the list of offences was partially responsible for a long delay before the Statute was used extensively. It also contributed to a misunderstanding of the actual aims and purposes of the Statute.⁷⁶ Furthermore, the lack of use of the subsection tended to give the erroneous impression that the Statute as a whole was not being utilized.

(b) Section 1962(b): Taking over an Enterprise

Where the previous subsection dealt with "legal" acquisitions, this subsection covers the "illegal" acquisition or maintenance of an interest in an enter-

75. This limitation was recognized early in the Bill's legislative history. In its brief to the House of Representatives, the American Bar Association stated:

"As a general rule, ...the leaders of organized crime have proved extremely difficult to convict of even one of the offenses deemed a 'racketeering activity' under the proposed statute. Proof of the collection of an 'unlawful debt' might prove easier, but in either case the Government would ultimately face the almost insuperable burden of tracing the illegal proceeds to the challenged investment. The difficulties introduced by this requirement--and the ease with which it could be used, particularly by a sophisticated crimina, to frustrate enforcement--severely limit the utility of Section 1962(a). Furthermore, it should be noted that if the proceeds could be traced, the persons responsible could doubtless be prosecuted under existing law for federal income tax evasion as well as, in some cases, a state offense." (American Bar Association Brief to the House of Representatives), House Report, 329.

76. Many people still think the Statute is solely to be used in "black money" cases.

prise⁷⁷ through a pattern of racketeering activity or collection of an unlawful debt.

Examples of cases in which this subsection has been used are: the taking over of a business by a loanshark,⁷⁸ a massive mortgage fraud scheme,⁷⁹ extortionate "muscling in" on legitimate companies,⁸⁰ and a system of "kickbacks" involving medical laboratories.⁸¹

This subsection, like the previous one, has not been used extensively in the way that subsections (c) and (d) have.

(c) Subsection 1962(c): Illegal use of an Enterprise

This subsection states that any person "employed by or associated with" an enterprise shall not "conduct or participate in the conduct" of the enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt. Prosecutions under 1962(c), or under 1962(c) and (d) jointly,⁸² form the vast majority of all prosecutions under the Statute.

The subsection is widely drawn, and it has been interpreted widely. This section covers situations where a criminal syndicate has a person operating inside a legitimate business enterprise, and is also used successfully to

77. As under subsection (a), it seems that an "enterprise" within the meaning of this subsection must be a legitimate enterprise, as an illegal enterprise makes little sense in the context of this subsection.

78. U.S. v. Parness, supra.

79. U.S. v. Yeldon et al (unreported, Boston Strike Force 1976): Mentioned in U.S. Dept. of Justice Strike Force 18 interdepartment memorandum dated February 27, 1976. On file with the office of the Co-ordinated Law Enforcement Unit, 2588 Cadboro Bay Road, Victoria, B.C.

80. U.S. v. Gambino and Conti, 566 F. 2d. 414 (2d Cir., 1977).

81. U.S. v. Weingarden et al, 468 F. Supp. 410 (1979).

82. 1962(d) is the general conspiracy section. Conspiracy to violate (a), (b) or (c) is an offence under subsection (d), but the subsection is used most often in conjunction with (c).

prosecute criminal gangs, or strictly illegal "enterprises." Actual prosecutions under this section have been concerned with corruption of public officials,⁸³ labour racketeering⁸⁴ and "groups of persons associated in fact."⁸⁵

(3) Penalties created by the Statute

(a) Fine, Prison and Forfeiture

Upon conviction of any one of the new offences provided for by the R.I.C.O. Statute, an accused is liable to a penalty of 20 years in prison and a fine of not more than \$25,000. In addition, section 1963 reenacts the provision of criminal forfeiture which was abolished by the first United States Congress in 1790.⁸⁶

The penalties provided for by the statute are, in most cases, more severe than the penalties for the underlying individual crimes. This reflects the philosophy that criminal acts committed in a pattern are different in kind and effect from the same acts committed individually.

The forfeiture provided for in the R.I.C.O. Statute is a different type of forfeiture than that found in modern criminal law. The modern criminal law

83. U.S. v. Brown, supra; U.S. v. Frumento, supra.

84. U.S. v. Rubin, 559 F. 2d. 975 (5th Cir. 1977); U.S. v. Campanale, 518 F. 2d. 352 (9th Cir. 1975).

85. U.S. v. Elliott, supra; U.S. v. McLaurin, 557 F. 2d. 1064 (5th Cir. 1977).

86. Section 1963 reads: "Whoever violates any provision of section 1962 of this chapter shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of Section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962."

typically provides for a type of forfeiture that acts against property.⁸⁷ The forfeiture in the R.I.C.O. Statute, however, acts against the person, rather than against property.⁸⁸ To obtain forfeiture under the R.I.C.O. Statute, ownership of the property by the person sought to be penalized must be proven.⁸⁹

(b) What is Forfeitable?

The R.I.C.O. Statute provides for mandatory forfeiture upon conviction.⁹⁰ In practice, however, fewer than ten per cent of the cases decided under the Statute have actually involved forfeiture.⁹¹ There are several reasons for this. First, American rules of criminal procedure require that any forfeiture being sought is to be alleged in the indictment. This means that the property owned by the accused must be ascertained prior to indictment. Second, ownership by the accused of the property must be proven by the prosecutor, and a "special jury verdict" rendered after a finding of guilt. This requires additional evidence and longer trials, and many prosecutors are not willing to go the extra step.⁹² But there is a third reason why forfeiture is not obtained in more cases, and this is due to the wording of the Statute itself which clearly makes "interests in enterprises" forfeitable, but has provoked argument on whether the "profits" of the enterprise are forfeitable.

87. Forfeiture in rem.

88. Forfeiture in personam.

89. While the type of forfeiture contained in the R.I.C.O. Statute is unique in modern American criminal law, it is not a new concept. Its origins are rooted in the common law whereby a person convicted of 'a felony lost his right to own property by virtue of his criminal acts.

90. U.S. v. L'Hoste, Unreported, 5th Circuit court of Appeals, Nos. '78-5593, '79-1606, Jan. 10, 1980.

91. According to Ed Weiner, Strike Force 18, in a telephone conversation, Oct. 18, 1979.

92. Ibid.

The Statute allows forfeiture of any "interest in an enterprise" that can be related in the required way to the "pattern of racketeering activity." For example, a retail store purchased with the proceeds of racketeering activity would be forfeitable. It is not always necessary to trace "proceeds" of racketeering activity into the acquisition or operation of an enterprise. In theory, a business enterprise could be forfeited even if it was not acquired with the proceeds of crime, and no illicit proceeds were used in its operation. For example, if a person was running a narcotics trafficking operation out of his restaurant which was, for all other purposes, a legitimately acquired and operated restaurant, his interest in the restaurant would still be forfeitable under the terms of the Statute, without the prosecution proving that money from the narcotics operation was used in the operation of the restaurant.⁹³

An "office" in an enterprise has been held to be forfeitable as being a contractual right of any kind affording a source of influence over" the enterprise.⁹⁴ A president of a corrupt union local could, therefore, be forced to forfeit his presidency upon conviction under the R.I.C.O. Statute.

Whether ill-gotten gains, not associated with an enterprise, are forfeitable under the Statute is, however, a matter of debate. This debate arises because the forfeiture provisions in the Statute are not as clear as they could be. Although apparently designed to make all ill-gotten gains forfeitable,⁹⁵ the

93. This would follow under a prosecution for a 1962(c) offence. The result may be considered harsh, but it must be emphasized that the R.I.C.O. Statute should not be applied against all persons whose actions are within its terms. The Statute necessitates competent and thorough screening of prosecutions so that undue hardship is not inflicted. Also, Section 1963(c) allows the rights of innocent persons to be considered in a forfeiture proceeding.

94. U.S. v. Rubin, 559 F. 2d 975 (1977) (5th Cir. 1977).

It is noteworthy that this case held that only offices presently held are forfeitable under the Statute. The right to seek similar offices in the future is not. To prohibit the future conduct of the convict, the civil provisions must be utilized. This is commonly done in cases of labour racketeering.

95. According to G.R. Blakey, in a private conversation Feb. 25, 1980, Ithaca, N.Y.

Statute has not been interpreted in this manner.⁹⁶ The confusion stems from the wording of subsection (1) of section 1963, which mandates forfeiture of "any interest...acquired or maintained in violation of" Section 1962. According to Professor Blakey, the word "interest" in Section 1963 was intended to encompass all things--money, real property, personal property, and so on--acquired through racketeering activity. However, the word "interest" is also used in sections 1962(a) and (b). In these subsections, the word is used in the sense of a "share" in an "enterprise." Because the forfeitable interest is an "interest acquired in violation of section 1962" it is not illogical to assume that the word "interest" was intended to refer to the "share" in the enterprise business, and not to encompass all ill-gotten gains.

This latter reading of the Statute is reinforced by the legislative history, which describes the forfeiture provisions as applying to interests in legitimate businesses.⁹⁷

Within the confines of this paper, it is impossible to analyse the issue in any detail.⁹⁸ It is only necessary to draw attention to the difficulties that have occurred as a result of the word "interest" being given two meanings. Because the concept of forfeiture as a criminal penalty is an unfamiliar one, the forfeiture provisions should be as clear as possible. Most of the later state statutes have recognized the problem and have delineated the things that are forfeitable.⁹⁹

96. U.S. v. Marubeni, supra, U.S. v. Thevis, (U.S.D.C.-N.D. Ga., Aug. 7, 1979) as reported in National Association of Attorneys General/Committee on the Office of Attorney General, Organized Crime Control Newsletter, Vol. 6, No. 3, Oct. 16, 1979, p. 4.

97. For example: Senator McClellan, House Hearings, p. 107; Attorney General Mitchell, House Hearings, p. 171.

98. Professor Blakey submits that the Marubeni case makes s. 1963(a)(2) redundant, and yet Strike Force 18 seems to take the position that only "interests in enterprises" are forfeitable. It would be interesting to have the opposing points of view analyzed in detail, but there is little point in doing so for our purposes.

99. E.g., Fla. Stat. f. 943.46-464 (1977) s. 5(2). The need for clarity in forfeiture provisions is reinforced by a recent decision of the British House of Lords which took a restrictive view of the forfeiture provisions contained in the Misuse of Drugs Act: See, on the decision: Hills, N. "House of Lords rules that drug crime does pay", Montreal Gazette, June 14, 1980, and Cook, S. and Zander, M. "Drug ringleaders to reclaim their loot", The Guardian, June 22, 1980.

(4) The Civil Remedies

Under the Statute, civil actions may be taken by the Attorney General, and by any person who suffers financial loss as a result of activities covered by the Statute.

(a) Actions by the Attorney General¹⁰⁰

The Attorney General is given broad powers to sue in the civil courts to prevent and restrain violations of the Act. The Attorney General may seek to divest a defendant of his interest in an enterprise,¹⁰¹ to restrict the future activities of any person, or to dissolve or reorganize any enterprise. Provision is made for interim restraining orders or prohibitions, if

100. "1964: Civil remedies:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper."

101. An order of divestiture is one requiring the defendant to dispose of his interest. It is not considered "punitive" because the defendant retains title to all proceeds of disposition. In practice, however, a defendant will often suffer financial losses in divesting himself of his interests.

necessary,¹⁰² for estoppel based on a prior criminal action,¹⁰³ and for the expedition of the action through the Courts.¹⁰⁴ There is no provision made in the Statute for the Attorney General to sue for damages.¹⁰⁵

It is in the civil provisions that the Statute is most directly patterned on American anti-trust law. Injunctions and divestures have never been part of the criminal law, and policemen and prosecutors are not accustomed to thinking in these terms. Because the types of activities associated with the R.I.C.O. Statute are typically "criminal" (as opposed to anti-trust offences, which do not carry the same moral stigma as the predicate offences under the R.I.C.O. Statute), police and prosecutors naturally think about "convictions" and "penalties" when there is evidence of a "pattern of racketeering activity."¹⁰⁶

102. S. 1964(b). See note 98 and later section in this paper on restraining orders.

103. 1964(d): "A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceedings brought by the United States."

104. Section 1966:

"In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action. The judge so designated shall assign such action for hearing as soon as practicable, participate in the hearings and determination thereof, and cause action to be expedited in every way."

105. However, it is perhaps arguable that the Attorney General is also a "person" entitled to sue for damages under s. 1964(c), since he is an "individual or entity capable of holding a legal or beneficial interest in property." (s. 1961(3)).

106. This attitude was especially noticeable in speaking with prosecutors at Strike Force 18, who were less positive about the potential of the civil provisions than was Professor Blakey.

The civil provisions of the Statute are commonly used after the conclusion of a criminal trial to obtain orders prohibiting the convict from engaging in activities similar to those of the "enterprise" with which he was associated (often, to prevent a convicted labour racketeer from engaging in union affairs). This is a worthwhile use of the civil provisions,¹⁰⁷ but the Americans have, with few exceptions, restricted their use of the provisions to this type of case and have not utilized the provisions to their full potential.

So far, there has been only one case indicative of the versatile and creative manner in which the civil provisions can be used.¹⁰⁸ That case involved an illegal gambling business. The government brought civil action seeking the following: divesture of the defendant's interest in the building in which certain gambling activities took place, an order prohibiting all defendants from engaging in bookmaking activities, an order compelling disclosure of the identities of those persons acting in concert with the defendants in the gambling business, and an order compelling each of the defendants to report income, employment and assets for a ten-year period. The defendants argued that the action was essentially a criminal proceeding, and that they were entitled to the rights guaranteed by the Constitution to defendants in civil cases. The Court rejected this argument and affirmed orders made by the lower Court granting default judgment in favour of the government and committing the defendants for contempt until they obeyed discovery orders made by the lower court.¹⁰⁹ Although this case was a success, it stands alone when examining the uses that have been made by the Attorney General of the civil provisions in cases where there has been no prior criminal conviction.

The wide scope of remedies given to the Attorney General allows considerable damage to be inflicted on criminal organizations through divesture, through

107. As discussed in the previous sections, there are no comparable provisions in Canadian law.

108. U.S. v. Cappetto, 502 F. 2d. 1351 (7th Cir. 1974).

109. *Ibid.*, p. 1354. The case report does not consider if the orders asked for were appropriate in the circumstances of the case, because the lower court had not ruled on these points.

reorganization, and by prohibiting the employment of certain individuals. Furthermore, the inherent advantages of a civil trial, including a lesser burden of proof, discovery of documents and witnesses, and compulsory testimony, enable the Attorney General to obtain information about an individual that might be difficult to obtain otherwise.¹¹⁰ This information becomes public information and need not be relegated to a restricted "intelligence" file. The lesser burden of proof in a civil trial might enable the government to bring suit to "clean up" a bar or hotel frequented by criminals. For example, a nightclub owner who encouraged narcotic dealers to frequent his club and took a share of their profits might be forced to divest himself of his ownership in the nightclub. This remedy may be obtained even if there is insufficient evidence upon which a jury would convict an accused of a narcotics violation. The Attorney General would have to show on the balance of probabilities that a "pattern" of dealing in narcotics was occurring in the club, and that the defendant was "associated with" the nightclub and "participated in the conduct" of it through the acts of narcotics trafficking. Compulsory discovery of the accused could assist the Attorney General in proving the case.

The lack of use of the civil provisions is attributable in part to their novelty. However, another major factor is the typical separation between departments of the government involved in enforcing the criminal laws, and those involved in civil litigation. These departments rarely coordinate their activities and are involved in different types of work. The civil provisions can only be used effectively if the difficulties inherent in this separation are recognized and overcome.

110. Note the request in the Cappetto case for identification of the other persons involved in the gambling business. The government was aware of certain individuals by nickname only, and was requesting that these people be identified.

b) Private Civil Remedies

Again patterned on anti-trust law, the R.I.C.O. Statute makes provision for any person injured in his business or property by reason of a violation of section 1962" to sue. If successful, the Statute reads that he "shall recover threefold the damages he sustains" and costs, including reasonable attorney's fees.¹¹¹ Private parties may also avail themselves of the remedies listed in section 1964(a), discussed above. However, unlike the provision under which the Attorney General may sue, the Statute makes no provision for the expedition of private civil suits, nor for estoppel based on a prior criminal conviction under the Statute.¹¹²

By providing for triple damages plus costs (note that the court has no discretion--the damages must be tripled if liability is proven), the civil provisions provide a strong incentive to sue. Aside from the obvious desirability of compensating the victim, the civil provisions have a hidden advantage. There is no additional taxing of government resources (through the use of government lawyers) involved in inflicting economic "punishment"¹¹³ on a person who has been involved in racketeering activities. All private civil actions are taken by a member of the private bar.

111. 1964(c): "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

112. It is, however, possible that estoppel may lie, even if not specifically provided for. See U.S. Department of Justice, Criminal Division, An Explanation of the Racketeer Influenced and Corrupt Organizations Statute, Fourth edition (unpublished pamphlet) p. 64.

113. Under American law, the civil provisions are not legally considered "punitive," although the triple damages provision has that effect.

The civil provisions will normally be used only in cases where there is a considerable amount of money involved.¹¹⁴ Because of the delays involved in civil actions, few cases have actually come to trial under the private civil provisions of the Statute. However, the potential of the provisions is enormous. If a public official is bribed and the government (municipal, provincial or federal) suffers damage, triple damages may be recovered.¹¹⁵ A businessman victimized by a loanshark can sue and recover his business, plus a substantial damage award.¹¹⁶ An insurance company which has paid claims on a pattern of arson can sue to recover three times the amount paid out.¹¹⁷ Any victim of a pattern of fraud can recover three times the amount he lost to the defendant. All of these actions may be taken with or without a prior criminal conviction for the "racketeering activity."¹¹⁸

It is obvious that the civil provisions will not be applicable in all cases. If the potential defendant has no assets, no action will be taken. But this factor emphasizes the attraction of the provisions: economic harm is done to those who have profited most through illegal activities.

114. However, because attorneys' fees plus costs are also recoverable, this is not always the case. See Gettings, Brian, "Materials on R.I.C.O.: Civil Overview," in Techniques in the Investigation and Prosecution of Organized Crime: Materials on R.I.C.O., Vol. 1, (Cornell Institute on Organized Crime, Jan. 1980), 37 at 54

115. Ibid., p. 51.

116. We were informed by members of Strike Force 18 that a private civil suit has been launched against Milton & Barbara Parness, who were previously convicted under the R.I.C.O. Statute of a loansharking takeover of a business. (U.S. v. Parness, 503 F. 2d 430 (2d Cir. 1974).) (Private interview, Washington, D.C., Feb. 26, 1980.)

117. Or a municipality may recover its costs in fighting the fire. We were informed by members of Strike Force 18 that the City of Milwaukee is suing to recover three times the amount it cost them to put out fires caused by arson. The defendants have previously been convicted under the R.I.C.O. Statute of conducting an "arson-for-profit" ring. (Hansen case; see International Association of Chiefs of Police, Organized Crime Bulletin, Vol. 2, No. 6, p. 7.)

118. Farmers Bank of the State of Delaware v. Bell Mortgage Corporation, 452 F. Supp. 1278 (1978), (U.S. Dist. Ct., D. Delaware).

(c) Civil Investigative Demand

Section 1968 of the Statute contains detailed provisions allowing the Attorney General to issue and serve a "Civil Investigative Demand" upon any person requiring him to produce "documentary materials relevant to a racketeering investigation."¹¹⁹ The limits of such demands are equivalent to those of a "subpoena duces tecum issued by a court in aid of a grand jury investigation of the alleged racketeering violation."¹²⁰ Although the section reads that the demand may be issued "prior to the institution of a civil or criminal proceeding," Professor Blakey (who drafted the legislation) informed us that the demand was designed only for civil proceedings.¹²¹

Section 1968 has never been used, and the researchers are doubtful that it ever will be. The Grand Jury is always used to obtain evidence for criminal charges, and civil rules of discovery can be used when the proceedings are strictly civil. Interested in the reason for enacting this section, the researchers discovered an explanation in an unpublished submission by the top attorneys in charge of Strike Force 18, the body responsible for the

119. Section 1968(a) reads:

"(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination."

120. Section 1968(c) reads:

"(c) No such demand shall--

(1) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation."

121. Private interview with Professor Blakey, Feb. 25, 1980, Ithaca, N.Y.

enforcement of the legislation.¹²² Selected quotations from this submission are informative:

"We note that the Civil Investigative Demand...was lifted from the anti-trust statute. ...The procedure works fairly well in anti-trust cases. The companies under investigation are usually very cooperative with the Anti-trust Division of the Department of Justice. ...It is interesting that of the many Civil Investigative Demands issued by the Anti-trust Division, hardly any actually result in a civil proceeding...

"The history of the Civil Investigative Demand in anti-trust law is instructive. In 1958, the United States Supreme Court held...that it was an abuse of discretion for a Federal Grand Jury to be used in anti-trust cases where a criminal action was not contemplated. Since the Anti-trust Division had previously used the Grand Jury extensively for investigative purposes that subsequently resulted only in civil proceedings, its effectiveness in regulating the business practices of the country by examination of documents was significantly curtailed. The Anti-trust Division was fearful that any use of the Grand Jury in noncriminal cases would be unwise in light of (that case). It could not utilize civil discovery unless a civil action was filed. But how would the evidence be gathered to formulate the allegations of the civil action without any authority to examine company documents? The Congressional response was the enactment of the Civil Investigative Demand in 1962. ...

"The Anti-trust Division has different goals than the Organized Crime Section. The regulation of economic policy is accomplished by cooperation. ...Organized criminals are not cooperative; their attorneys will challenge every Civil Investigative Demand that is issued. The proceedings will be unending and, very likely, no helpful documents will be obtained. It is the goal of the Organized Crime Section to attack the financial underpinnings of organized crime and to break up any business enterprises they control. The Civil Investigative Demand is a poor tool to accomplish this goal.

"It is most significant that the problem that necessitated the Civil Investigative Demand in anti-trust cases does not exist in organized crime cases. We can make full utilization of the Grand Jury to obtain documents and take testimony. The Grand Jury subpoena is more wideranging, less likely to

122. Memorandum to William S. Lynch, Chief, Organized Crime and Racketeering Section, from John M. Dowd and Edward C. Weiner, Special Attorneys, Strike Force 18, "Memorandum on Procedural Sections in Proposed Federal Criminal Code," copy received from Edward Weiner, Nov. 2, 1979, on file at the office of the Co-ordinated Law Enforcement Unit, 2588 Cadboro Bay Road, Victoria, B.C.

be challenged, and more swiftly enforced than the Civil Investigative Demand. Most organized crime cases are directed toward criminal prosecution (although Grand Jury evidence could surely be used in a civil action under [the R.I.C.O. Statute]) ...no Civil Investigative Demand has been issued in organized crime cases since the statute was passed in 1970."¹²³

In light of the comments made by Strike Force 18, the researchers do not recommend the enactment of a section similar to section 1968 in Canada. We recognize that Canada is lacking in such alternate evidence-gathering mechanisms for use in criminal cases as the Grand Jury subpoena, but a Civil Investigative Demand does not seem to be the answer, since it apparently is not applicable to criminal cases in any event. As for its use in civil cases, it is submitted that civil rules of discovery combined with the ability to obtain restraining orders, are sufficient. Furthermore, the enactment of the Civil Investigative Demand would contribute to the constitutional problems involved in incorporating the civil provisions into Canadian law.¹²⁴

The researchers therefore recommend that the whole of section 1968 (which covers almost four pages of the Statute's text) be deleted from any Canadian version that is proposed.

5. Restraining Orders and Prohibitions

The R.I.C.O. Statute contains provisions that enable assets to be "frozen" prior to a criminal trial and prior to a civil suit brought by the Attorney General. Section 1963(b), dealing with criminal actions, reads as follows:

"In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders and prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper."

¹²³. Ibid., pp. 26-29.

¹²⁴. See "Opinion on Constitutionality of the R.I.C.O. Provisions," written by Professor James MacPherson, appended hereto, Appendix C.

Section 1964(b), dealing with civil actions, reads:

"The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper."

There are no provisions in the Statute that could be used by a private party to freeze assets in a private suit under the Statute.

The existence of freezing provisions is very important to the criminal portion of the Statute, because forfeiture would be impossible without them.

There are two problems with the restraining orders provided for by the Statute. One has to do with the wording of Section 1963(b): the Section reads that restraining orders are available in actions brought "under this section." The relevant section deals with penalizing criminal acts, and the section that proscribes the criminal conduct is actually the previous section, s. 1962. To avoid potential difficulties, the words "this section" should be changed to "this Statute."

A more significant problem is the reluctance of some judges to grant restraining orders. We were told by members of Strike Force 18¹²⁵ that some judges insist that the prosecution prove "irreparable harm" would probably result if an order is refused. Members of the Strike Force suggested that pronouncement of a restraining order be mandatory once it is shown that certain assets could be liable to forfeiture upon completion of the case. It was also suggested that posting of a performance bond be mandatory where a restraining order is denied. We recommend that these suggestions be adopted in any Canadian version of the R.I.C.O. Statute.

125. Private interview, Ed Weiner, Strike Force 18, Washington, D.C., Feb. 25, 1980.

VI. APPLICATION OF THE R.I.C.O. STATUTE TO ENTERPRISE CRIMES IN CANADA

(A) ADVANTAGES, DISADVANTAGES, AND DIFFICULTIES

The researchers discerned certain advantages and disadvantages to the R.I.C.O. Statute and two major difficulties with the implementation of a similar statute in Canada. Although these have been referred to in previous sections of the paper, they are summarized here.

1. ADVANTAGE: The Ability to Focus Proceedings on an Organization

The R.I.C.O. Statute enables criminal proceedings to be focused on an organization, as opposed to the individuals that comprise that organization. Just as a legitimate business organization is different in character from the individuals that comprise it, so is a criminal organization. Use of the R.I.C.O. Statute implies that the accused have committed more than one criminal act and that those criminal acts have been calculated and planned for the sole purposes of financial gain. Once an accused is proven to be a member of the organization, and to have been aware of the organization's objects and the general means whereby those objects were achieved, his conduct is viewed in relation to the organization as a whole, and his individual criminal acts become less important than his relationship to the organization.

In this respect, the R.I.C.O. Statute is especially useful for prosecuting multi-faceted criminal organizations. The rule against prosecution of "multiple conspiracies" as it is presently understood, prohibits the offering of evidence of a wide variety of criminal offences in one trial. R.I.C.O. would permit this, if all are linked to a common enterprise.

2. ADVANTAGE: Combatting the Infiltration of the Legitimate Economy

There are few provisions, if any, in Canadian law that can be used effectively to combat the use or acquisition of legitimate business enterprises by persons involved in criminal activities. The R.I.C.O. Statute recognizes that illicit, untaxed profits channeled into the legitimate business community can

have a damaging effect on the economy. It recognizes that infiltration of the legitimate business world by sophisticated criminals can result in the monopolization of complete industries, and that it often involves corruption of public officials. Criminals who have built "legitimate" financial empires through criminal activities pose a dangerous threat to society: the greater their wealth, the greater their potential to amass more wealth, and the greater their ability to disguise further criminal acts. The R.I.C.O. Statute attempts to stop the perpetuation of this cycle.

3. ADVANTAGE: Criminal Forfeiture

The type of forfeiture provided for by the R.I.C.O. Statute is novel, but also logical and attractive in its attempt to remove the profit incentive from criminal activity. Although no one knows how much money is being made through organized criminal activities, it is clear that the amounts are enormous. While the criminal justice system spends millions of dollars investigating and prosecuting criminal activities, rarely are any of the profits of these activities confiscated.¹ The R.I.C.O. Statute not only allows forfeiture of ill-gotten gains, but of any legitimate business enterprise that has been used or acquired in violation of the Act.

By means of these forfeitures, the state recovers from criminal organizations at least part of the cost of investigating and prosecuting. At present, fines are the only means by which the criminal justice system generates revenue.

4. ADVANTAGE: Civil Suits

The provisions for both private and governmental civil suits, although not yet extensively used in the United States, are very useful. Civil suits provide leeway for imaginative remedies, and they allow action to be taken on cases where the evidence is insufficient for a criminal prosecution. Private civil

1. Ill-gotten gains forfeiture provisions are not unique to the United States. For example, in Britain, the Misuse of Drugs Act (1971) permits the forfeiture of "anything" that "relates to the offence". This act, however, has recently received a severely limiting interpretation from the House of Lords. See: Hills, Nicholas, "House of Lords rules that drug crime does pay", Montreal Gazette, June 14, 1980; Zander, M. and Cook, S., "Drug ringleaders to reclaim their loot", The Guardian, June 22, 1980.

under the R.I.C.O. Statute are attractive for two reasons. First, they compensate the victim and work as an economic punishment to the accused, and second, in cases where there has been no criminal prosecution, they prevent the unjust enrichment of the individual (at no cost to the government). In many cases, the recovery of triple damages should constitute a more effective punishment than imposition of a brief term of imprisonment.

5. DISADVANTAGE: The Cost (in court time and money) of Prosecution

Investigations under the R.I.C.O. Statute are long and expensive; so are the prosecutions. This state of affairs arises partly from the complexity of the cases and partly from the high degree of sophistication on the part of those who are being prosecuted. Confessions of guilt, unambiguous statements indicating criminal intent, and other hallmarks of "street" crime are usually lacking in sophisticated enterprise crimes. Most of the cases will depend largely upon circumstantial evidence which must be gathered in a painstaking way and presented in exhaustive detail to the court. Both investigators and prosecutors will have to be among the most senior and experienced available. It is reasonable to expect that evidence obtained through wiretapping will play a major role in R.I.C.O. prosecutions. Use of wiretap evidence, in and of itself, indicates that preparation for trial and the trial itself will be a long and expensive process. R.I.C.O. cases are closely analogous to cases of "white collar" or commercial crime; the cost (in time and money) of prosecuting an R.I.C.O. case should approximate that spent on commercial crime cases.

6. DIFFICULTY: The Constitutional Problem

The enactment in Canada of provisions similar to those contained in the R.I.C.O. Statute poses constitutional problems, which are extensively analysed in Appendix C to this paper. It seems unlikely that the Federal government is able to enact the complete R.I.C.O. package. Private civil suits and civil suits brought by government which are not ancillary to a criminal prosecution probably require provincial legislation in order to have constitutional validity. Such a split of jurisdiction is undesirable, and none of the three options for enactment as set out in the "Recommendations" sections is completely satisfactory.

7. DIFFICULTY: Lack of Evidentiary Aids

It is important to emphasize that, while the R.I.C.O. Statute provides several new remedies, it does not make problems of investigation and proof any easier. Nothing in the Statute (with the exception of the civil investigative demand--which is not used) is designed to assist the investigator in putting together a R.I.C.O. case. Neither does anything in the Statute help the prosecutor in overcoming the burden of proof upon him.

During the course of this study it became obvious to us that certain aids to investigation which exist in the United States but not here played an important role in R.I.C.O. cases. The investigative Grand Jury is used extensively, and many prosecutions in the United States would be impossible without witness immunity and protection provisions. These and other investigative aids were enacted as part of the package entitled the Organized Crime Control Act. If law enforcement authorities in Canada are to make a serious assault on organized criminals and enterprise crime, consideration will have to be given to the reintroduction of the Grand Jury and to the adoption of a statutory framework dealing with witness protection and witness immunity. It is outside the scope of this study to say more.

One area of particular difficulty should be mentioned. To obtain a conviction under section 1962(a) for the investing of monies obtained from a pattern of racketeering activity in a legitimate business, it is necessary for the Crown to prove beyond a reasonable doubt the origin of the funds in question. This "tracing" of the money back to the antecedent criminal activity is always difficult and usually impossible. For this reason, there have been very few prosecutions and even fewer convictions under this section.

The Canadian Criminal Code contains a number of provisions in which the burden of proof switches from the Crown to the accused after certain preliminary facts have been demonstrated. These are called "reverse onus provisions." Some examples are:

where an accused fails to appear in court when required to do so, the onus falls upon him to prove that he had a "lawful excuse;"²

where an accused is involved in an accident and leaves the scene without stopping or giving his name and address, the burden switches to him to show that he did not have "an intent to escape civil and criminal liability;"³

an accused charged with possession of a narcotic for the purpose of trafficking who is shown to have had that narcotic in his possession must then prove, on the balance of probabilities, that he did not have possession "for the purpose of trafficking;"⁴

We feel that it is both fair and logical to establish a reverse onus provision in section 1962(a) of the R.I.C.O. Statute. If the prosecution is able to demonstrate that the accused participated in a pattern of racketeering activity, and if the prosecution also demonstrates that the accused acquired certain assets of substantial value during the period of time in which the racketeering activity was occurring, then the onus should be reversed. The prosecution should not have to prove beyond any reasonable doubt that the asset in question was acquired with money derived from the racketeering activity, but rather, the accused should carry the burden of showing (on the balance of probabilities) that the asset in question was not acquired with money obtained from crime. This reverse onus provision would relieve the Crown of any need to "trace" the funds in question and demonstrate a link between the criminal activity and the acquired assets. The suggested provision is logical because it should be applied only to assets acquired during the time when acts of racketeering were occurring. The suggested provision is fair, because the onus is reversed only after the Crown has proven that the accused has participated in at least two serious criminal offences (i.e., that he has participated in a pattern of racketeering activity).

2. Criminal Code R.S.C. 1970, Chapter C-34, s. 133.

3. Ibid. s. 233.

4. Narcotic Control Act R.S.C. 1970, Chapter N-1, s. 8.

(B) TYPES OF ENTERPRISE CRIMES

If provisions similar to those contained in the R.I.C.O. Statute were enacted in Canada, it is clear that the provisions would be useful in several different types of prosecution. These will each be discussed briefly.

1. Narcotics Distribution

The R.I.C.O. provisions should prove to be of more use in narcotics cases in Canada than in the United States. Unlike his Canadian counterpart, an American drug prosecutor has a number of statutes at his disposal providing for forfeiture as well as other penalties.⁵ The R.I.C.O. Statute has been

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5. The Comprehensive Drug Abuse Prevention and Control Act of 1970 was subsequently amended to add 21 U.S.C. Sec. 848, making the "continuing criminal enterprise" a separate drug offence punishable by a minimum penalty of 10 years in prison for a first, and 20 years for a second, offence, with a maximum life sentence for either a first or second offence. In addition, it enacts forfeiture provisions similar to those contained in the R.I.C.O. Statute. Title 21 U.S.C. Sec. 848 provides:

"(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than \$100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than \$200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States--

- (A) the profits obtained by him in such enterprise, and
- (B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

used in the United States in narcotics cases where the transactions took place at a legitimate place of business,⁶ or where the narcotics scheme involves a number of other illegal acts.⁷ This is because, in the first mentioned case, the business in question would be subject to forfeiture, and, in the last mentioned case, distribution of narcotics can be shown to be just a part of an overall criminal enterprise. However, in the United States there appears to be a preference for using statutes which were designed specifically for drug prosecutions.

The R.I.C.O. Statute has two attractive features which would improve drug prosecutions in this country. The first is the avoidance of the rule against proving "multiple conspiracies" in one trial. By defining the "enterprise" as a "group of persons associated in fact to distribute narcotics," a number of separate agreements and associated criminal acts can be presented together in the same trial. This more accurately depicts the nature of a narcotic distribution business. A second major advantage is the forfeiture provision, which is considerably broader than that contained in our present Narcotic Control Act. Not only would the actual cash profits of illegal drug manufacture and distribution be forfeitable to the Crown, but a trafficker conducting his drug business on his "legitimate" business premises would stand to forfeit the legitimate business as well.

5. (cont.) Also, the Controlled Substances Act (21 U.S.C. 881) as amended by the Psychotropic Substances Act of 1978 (P.L. 95-633) provides for the forfeiture of anything of value furnished, or intended to be furnished, illegally in exchange for controlled substances. And the Reports of Currency and Foreign Transactions Act (31 U.S.C. 1051-1143) can also be used in many drug importation cases. That Act requires reporting of all money movement over \$5,000. Violations of the Act make the money forfeitable (S. 1102) and can subject the person to a criminal penalty of a \$500,000 fine and/or five years in prison, if the violation is committed in furtherance of the commission of any other violation of Federal Law, or committed as part of a pattern of illegal activity involving transactions exceeding \$100,000 in any 12-month period. (S. 1059).

6. See, e.g., U.S. v. Swiderski, 593 F.2d 1246 (Dist. of Columbia, 1978)

7. See, e.g., U.S. v. Malatesta, 583 F.2d. 748 (5th Cir., 1978)

2. Loansharking

The American R.I.C.O. statute does not make an act of loansharking, in and of itself, a criminal offence. However, the Statute creates the offence of using or investing money obtained from the "collection of an unlawful debt" to acquire a legitimate business, the offence of acquiring or maintaining an interest in or control of an enterprise through collection of an unlawful debt, and the offence of conducting the affairs of an enterprise through collection of an unlawful debt. The proclamation of the new Criminal Code section 305.1 will mean that this section can be included as a predicate offence in a R.I.C.O.-type statute. This will be simpler and clearer than defining an "unlawful debt", and the only situation that would not be covered by its inclusion that is covered by the phrase "collection of an unlawful debt" is the collection of gambling debts with an interest rate of less than 60% per annum (the prohibited rate under section 305.1). The R.I.C.O. Statute is well suited to the prosecution of loansharks. It recognizes that a loanshark often works in conjunction with criminals in other fields,⁸ or out of legitimate business premises. The Statute also recognizes a common result of an usurious loan obtained from an organized crime figure: the business of the victim is eventually taken over in satisfaction of the debt.⁹ In cases where the amount involved is substantial, the treble damage provisions may provide partial redress for the victim and act as a further deterrent to loansharking activity.

3. Gambling

In the United States, gambling "enterprises" are dealt with under another Title of the Organized Crime Control Act of 1970,¹⁰ but the R.I.C.O. Statute is also used extensively to prosecute syndicated gambling cases. In Canada, most prosecutions of illegal gambling businesses and their proprietors appear to involve very small amounts of money and tend to focus on the operations of a brief period of time. Since monetary penalties in this area (at present)

8. See, e.g., U.S. v. Parness 503 F.2d. 430 (2d Cir., 1974)

9. See, e.g., U.S. v. Gambino and Conti, 566 F.2d. 414 (2d. Cir., 1977)

10. 18 U.S.C. 1955 (enacted as Title VIII of the Organized Crime Control Act)

amount to little more than a license to operate, these penalties provide a disincentive to police investigation. This, in turn, fosters an atmosphere amongst bookmakers and the public that illegal gambling enjoys tacit official approval.

Under the provisions of the R.I.C.O. Statute illegal enterprise gambling activities can be placed in perspective. The prosecution is entitled to prove, as predicate crimes which constitute the "pattern of racketeering activity", offences of differing types. By proving the commission of gambling offences along with (for example) narcotics violations, securities frauds, and "arson-for-hire", the prosecution can demonstrate the interrelationship of these activities. This will serve to emphasize that gambling is an important source of revenue for the traditional organized crime families.

4. Labour Corruption

The R.I.C.O. Statute has proven invaluable in dealing with the corrupt use of labour unions in the United States. The Statute is well suited to the removal of corrupt influence from the labour union structure, because the criminal forfeiture provisions can be used after conviction to obtain forfeiture of offices held by the accused.¹¹ The civil provisions of the R.I.C.O. Statute can be used to block the subsequent reelection of convicted persons to union offices.

5. Criminal gangs, such as Motorcycle Gangs

Although a major setback in this area has recently been encountered, the researchers believe that the R.I.C.O. Statute will prove useful and successful in the prosecution of motorcycle gangs. Members of the Hell's Angels motorcycle gang were recently prosecuted under the R.I.C.O. Statute, but the jury was unable to reach a verdict for most of the defendants. The major

1. U.S. v. Rubin, 559 F.2d. 975 (5th Cir., 1977)

difficulty with the case was not the use of the R.I.C.O. Statute, but its sheer complexity: 33 defendants were charged with a series of different criminal acts, and 194 prosecution witnesses were called over a nine-month period.¹² Charges have now been relaid, still under the R.I.C.O. Statute, but without alleging that the club itself was the "enterprise." Instead, the indictment now reads that the illegal activities of the enterprise were "facilitated by the relationship of the enterprise to the Hell's Angels Motorcycle Club." Only 14 defendants have been indicted, and apparently 10 or fewer will actually stand trial.¹³ These changes should enable the prosecution to be successful.

The Statute has been used successfully to prosecute a group of people who were "associated in fact" to commit various illegal acts,¹⁴ and prosecutors anticipate that the Statute may be used in future to attack members of large national crime syndicates like "La Cosa Nostra" by charging that the syndicate itself is the "enterprise." Theoretically, this type of prosecution is possible, but difficulties in interpretation of the act and problems of proof make it unavailable at the present time.¹⁵

12. U.S. v. Barger et al (San Francisco). On July 2, 1980, after 9 months and a cost of \$5 million, the jury was unable to reach a verdict on most counts, and a mistrial was declared. The gang leader was acquitted on the racketeering charges.

See, on the verdict; Endicott, William, "U.S. Plans New Trial for Hell's Angels," Los Angeles Times, July 4, 1980, p. 3 and 28, and "Angels Celebrate Mistrial," Vancouver Sun, July 3, 1980.

13. Cooney, William, "New Indictments of Hell's Angels," San Francisco Chronicle, August 13, 1980.

14. See discussion in Chapter V(B) on the meaning of the word "enterprise."

15. Just such a case may soon be before the courts. A recent newspaper report states that Frank Tieri has been indicted on charges of racketeering. The indictment apparently accuses him of being the boss of a New York City "crime family", a charge never used before in a federal case. (See: "Titular Distinction, Dubious Honour", New York Times, July 6, 1980.) It was not possible to tell from the report whether the R.I.C.O. Statute was the one under which he was charged, nor any details of the charge. Further news on the case will, however, be watched for with interest.

When a group such as a motorcycle gang is the target of a R.I.C.O. prosecution, evidence may be led of the membership structure of the gang and the relative positions held by each accused. This increases the chance of obtaining a conviction against a senior gang member who, although not personally involved in the commission of the criminal acts, knowingly took a share of the profits.

6. White Collar Crime

Many commercial crimes, perhaps most commercial crimes, could be successfully prosecuted under the R.I.C.O. Statute.¹⁶ In this type of case, the availability of injunctions and restraining orders to prevent disposal by the accused of property and documents is especially useful. Economic penalties seem especially appropriate for nonviolent, economic offences, and the large monetary amounts involved in many commercial crimes suggest that revenue from forfeitures could be substantial.

Private civil suits also have great potential where the plaintiff has been the victim of a white collar crime. If it is expected that the outcome of a criminal prosecution is not likely to involve a substantial term of imprisonment, then it makes sense to encourage the victim to sue privately for treble damages. In this manner the victim is compensated, the unjust enrichment of the perpetrator has been prevented, and the suit has been conducted at no direct cost to the government.

15 (cont.)

The other case of interest in this area is the "Omega Case" in New Jersey (State v. Boiardo et al SGJ49-78-7, (May 23, 1979).) The indictment in that case charges, under state law, several individuals that they "knowingly, willfully and unlawfully did conspire, confederate and agree together to enter into a continuous relationship of affiliation with a secret nationwide organization known by its members as 'This Thing of Ours' (La Cosa Nostra), and composed of units known as families." The case has not been heard to our knowledge.

16. See, e.g., U.S. v. Pray, 452 F. Supp 788 (Penn.)

7. Laundering of Money and Infiltration of Legitimate Business

The R.I.C.O. Statute makes the use of legitimate business enterprises to further or disguise criminal acts a crime, and it outlaws the investment of the proceeds of crime to acquire legitimate businesses. It recognizes the dangers posed by both of these activities to the legitimate economic system, and makes the actual businesses used or acquired forfeitable. Prompted by the lack of adequate Canadian laws to deal with the laundering of dirty money and the infiltration of legitimate business, adoption of the R.I.C.O. Statute has been recommended by both Criminal Intelligence Service Ontario¹⁷ and by the Quebec Crime Commission.¹⁸

If the Statute is enacted here, it must be expected that a greater commitment to the gathering of criminal intelligence on financial and commercial matters will be needed. To trace the route taken by dirty money and to obtain forfeiture of a large business operation will require substantial amounts of detailed documentation. Expertise in accounting, commerce, and computer science will be at least as important to the investigator as the traditional police skills.

8. Summary

While the R.I.C.O. Statute has the potential to become an effective weapon in the fight against enterprise crime, it is by no means the final answer. Its virtues are that it provides the prosecution with a novel yet sensible way of illustrating for the court and the public the economic underpinnings of enterprise crimes. But the Statute provides remedies only--it does nothing to ease the task of gathering evidence and tendering it in admissible form. In those areas, devices used by the United States, such as the investigative Grand Jury, witness protection and immunity provisions, and currency reporting laws should be considered as possible solutions to deficiencies in evidence gathering mechanisms in this country.

17. Private report received from Criminal Intelligence Service Ontario.

18. Quebec, Police Commission of Inquiry on Organized Crime. Organized Crime and the World of Business, p. 270. (Editeur Officiel du Quebec, 1976).

VII. RECOMMENDATIONS AND CONCLUSIONS

(A) RECOMMENDATION FOR ADOPTION OF R.I.C.O. STATUTE IN CANADA

The researchers' major recommendation is that Canada adopt legislation similar to the R.I.C.O. Statute. The Statute is a novel piece of legislation which, when used properly and in conjunction with sound investigative techniques, can attack criminal organizations and their movement into legitimate business. The balance of these recommendations is predicated upon this primary recommendation.

1. Federal or Provincial Legislation?

A legal opinion prepared by Professor James MacPherson* on the constitutional ramifications of incorporating R.I.C.O. provisions into Canadian law is appended to this paper. The substance of Professor MacPherson's opinion is that enacting the criminal portions of the Statute would be within the criminal law power of the federal government. However, the civil provisions of the Statute cause more difficulty. According to Professor MacPherson, if a civil claim is considered in the context of a criminal trial and as part of the sentencing process, it will probably be within the criminal law power of the federal government. But civil actions unrelated to a criminal conviction are unlikely to be considered a valid exercise of Parliament's authority. He goes on to state, however, that it may be possible to argue that civil provisions such as these, although unrelated to a criminal conviction, are a valid exercise of Parliament's intention to "prevent crime" (page 18), although he is not optimistic about the success of such an argument.

In view of the above, legislators are left with three alternatives, the choice of which will be dictated by policy considerations, the political climate, and costs. Unable to assess any of these, the researchers have made no recommendation in this respect, and simply present the possible choices.

* Faculty of Law, University of Victoria; Visiting Professor at Osgoode Hall Law School for the academic year 1979-80.

(a) Alternative #1: Coordinate The Implementation Of Complementary
Federal And Provincial Legislation.

This alternative is the costliest, the most cumbersome, but the safest from a constitutional point of view if it is desired to incorporate the complete Statute into Canadian law. A considerable amount of time and effort will be involved because the acceptance of this alternative necessitates that:

- two separate Acts be drafted: one, incorporating the criminal provisions and the civil provisions that can be used as part of the criminal sentencing process (such as injunctions and prohibitions) for adoption by the federal government; and the other, a Model Act incorporating only the civil provisions for adoption by the provinces;
- the provinces be persuaded to adopt the Model Act;
- provision be made for reciprocal enforcement among the provinces of injunctions, restraining orders, prohibitions and judgments;
- the Model Act provide a limitation period (and perhaps even rules of discovery) so that these will not vary from province to province.

One problem with this alternative is that, even if this massive effort in coordination is achieved, the constitutionality of the provincial civil provisions is still open to challenge. The success of such a challenge, according to Professor MacPherson, is not probable, but since the civil provisions involve proving a series of criminal offences on a civil standard of proof, the courts may have a considerable amount of difficulty with the question. Even if the legislation is ultimately found to be valid, years of delay may be experienced as the test case works its way through the Courts.

(b) Alternative #2: Enact The Complete Package As Federal Legislation
And Argue The Constitutional Challenges As They
Occur.

This alternative would avoid the problems of federal-provincial coordination and would involve an attempt to answer constitutional challenges by arguing that the legislation is in essence criminal law because the predicate offences

are criminal and the provisions are aimed at crime prevention. This submission is more likely to succeed in the case of injunctions and divestitures (which serve to enhance and support the criminal process) than in the case of private civil suits.

It is preferable to have one level of government enact and administer all the legislation. This alternative would ignore the constitutional problem until it arises. If a later constitutional challenge succeeded, the civil provisions would have to be discarded or enacted as provincial law.

c) Alternative #3: Discard The Civil Provisions Which Are Not Predicated Upon A Criminal Conviction.

The researchers are of the opinion that the portion of the R.I.C.O. Statute which allows civil suits without a prior criminal conviction is an important part of that Statute. Although lawsuits arising from these provisions are few, the researchers feel that there is a potential for greater use. However, members of the Strike Force charged with enforcing the Statute are not of the same opinion, at least insofar as civil suits launched by the government are concerned. In their opinion, "criminal conduct is criminal conduct," and the civil process is not appropriate to deal with it. This approach, shared by law enforcement agencies, is mainly responsible for underutilization of the civil provisions. Furthermore, the validity (from a civil liberties point of view) of civil proceedings based on a "civil finding of guilt" has been questioned by scholars in the United States.¹ Therefore, a choice may be made to abandon the civil provisions altogether.

2. The Criminal Provisions

We do not favour enactment of the R.I.C.O. Statute as a separate piece of legislation like the Narcotic Control Act. Because most of the predicate

1. See "Criminal Law--Enforcing Criminal Laws Through Civil Proceedings: Section 1964 of the Organized Crime Control Act of 1970, 18 U.S.C. 1964 (1970)", 53 Texas Law Review 1055, (1975).

offences are contained in the Criminal Code, we recommend that the R.I.C.O. provisions be made a part of it, as was done with the Protection of Privacy Act and the Bail Reform Act. We do not recommend use of the word "racketeer" anywhere in the statute. The word "racketeer" is seldom used in Canada and is wrought with vivid connotation. As has been pointed out previously, the R.I.C.O. Statute does not apply exclusively to traditional crime syndicates and, in our opinion, use of the word "racketeer" implies that it is intended to be so restricted. We suggest that the Statute be referred to as the "Corrupt Organizations Act" or the "Criminal Enterprise Act", and that the words "criminal activity" be substituted for "racketeering activity" wherever those words appear in the Statute.

(a) Predicate Offences

The offences included as predicate offences (those defining the phrase "criminal activity") would be comparable to the offences listed in section 178.1 of the Criminal Code, that is, offences for which a wiretap authorization may be obtained. However, to cover the offence of loansharking, we recommend deleting all reference to the Small Loans Act and incorporating the new section 305.1 as a predicate offence, assuming it is proclaimed in the near future.²

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2. If, for some reason it is not proclaimed, provisions similar to the "unlawful debt" provisions contained in the American Statute should be adopted.

1961(6) 'unlawful debt' means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate."

We also suggest the omission of offences such as "treason" and "intimidating Parliament" from the list of predicate offences, since those offences are not consistent with the philosophy behind the proposal. We recommend the inclusion of the whole of section 186 (relating to betting and bookmaking). Section 178.1 lists only s. 186(1)(e) which prohibits pool-selling and bookmaking.³

(b) Definitions

The word "pattern" should be defined in specific terms. The lack of a concrete definition has caused problems and led to litigation in the United States. The definition used by the Florida⁴ R.I.C.O. Statute defines the phrase as follows:

"Pattern of racketeering activity" means engaging in at least two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after the effective date of this Act and that the last of such incidents occurred within five years after a prior incident of racketeering conduct.

We favour a similar definition.⁵

3. Consideration should also be given to including criminal offences from the Combines Investigation Act, R.S.C., c. 314.

4. Fla. Stat. 943. 46-464 (1977).

5. Several of the American States have now enacted their own R.I.C.O. legislation. Because they have had the benefit of examining the Federal experience, the researchers have studied a few of the State statutes to ascertain what changes were made. Many of the State statutes instituted changes that we thought were necessary, and defining the word "pattern" is one of them. The Florida definition set out above is the same as that contained in the proposed New Mexico statute. (See United States, National Association of Attorneys General, Committee on the Office of Attorney General, Organized Crime Newsletter, December 20, 1979, p. 11.)

The definition of the word "enterprise" should be changed to expressly include illicit or illegal enterprises; federal, provincial and municipal governments; and foreign-based corporations. The word "individual" should be deleted.

The definitions of "racketeering investigator," "racketeering investigation" and "documentary material" can be deleted. These relate to civil investigative demands--a portion of the Statute that we do not recommend be adopted.

(c) The New Offences

Keeping the wording substantially as it is in the American Statute, we recommend reversing the order of the offences so that the 1962(c) offence would come first and the 1962(a) offence third, leaving 1962(b) and (d) in their present positions. This change is a minor one which reflects the greater prevalence of the (c) crimes, and avoids the implication arising from placing the "investing" offence first.⁶ We also recommend deleting the "purchase of shares on the open market" exception to the investing offence.⁷

6. See Discussion in Chapter V on Section 1962(a).

7. 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

This exception was incorporated during the legislative process at the urging of the American Bar Association, and apparently reflects the philosophy that the offence is aimed at "control" more than "investment."⁸ To us, an exception such as this is not logical if, as we submit, the section's thrust is to prevent the legitimizing of criminal wealth and its effect on the economy. If all ill-gotten gains are forfeitable, it is inconsistent to prohibit the investment of those gains in only certain types of enterprises.

We recommend changing the wording of the "investing" section, (1962(a)) to delete the words "in which such person has participated as a principal within the meaning of section 2, title 18, United States Code." These words do not make sense in a Canadian context, as American and Canadian law differ substantially in this area. We visualize the use of s. 21 of the Criminal Code to make parties to the offence liable for the offence so that a "moneymover" who knowingly assists a criminal to launder his dirty money could be convicted of aiding and abetting the new offence of "investing."

(d) The Forfeiture Provisions

As was previously mentioned, the intent of the draftsmen of the R.I.C.O. Statute was to provide for the mandatory forfeiture of two classes of property: (1) any profits or proceeds deriving from a pattern of racketeering activity or the commission of a R.I.C.O. offence and, (2) any interest, etc., of any kind affording a source of influence over any enterprise which was the subject of a R.I.C.O. violation. However, the wording of the criminal forfeiture section (in section 1963(a)) is ambiguous. While it is clear that any interest in an enterprise (or affording a source of influence over an enterprise) is forfeitable, it is much less clear that the profits or proceeds of a pattern of racketeering activity or a R.I.C.O. offence can be forfeited.

The matter is of considerable importance. On a prosecution under section 1962(a) dealing with the laundering of dirty money, the evidence may reveal that a portion of the money obtained from criminal activity was invested in a

8. Private conversation with Professor Bob Blakey by telephone, March, 1980.

certain business and a portion of the money was deposited into a bank account. While the accused person's interest in the business is clearly forfeitable upon conviction, the status of the money in the bank account is unclear. To take another example, we may consider the position of a labour union official who receives bribes to induce him to agree to certain contracts. Upon conviction, his office in the labour union (the labour union being the "enterprise") is forfeitable. However, without a clear provision that the profits of the R.I.C.O. offence or the predicate offences are forfeitable, the amounts of the bribes themselves could not be forfeited.

We recommend removal of this ambiguity, and the adoption of a clear provision that the profits of crime,⁹ as well as any interest of any kind in, or affording a source of influence over the enterprise in question, be subject to forfeiture.

A typical forfeiture section might read as follows:

(1) Everyone who commits an offence against any provision of this Part is guilty of an indictable offence and is liable to imprisonment for life.¹⁰

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9. It was suggested to us that an ill-gotten gains forfeiture section would not be necessary if the Statute incorporated a provision similar to that contained in the Florida R.I.C.O. Statute (Fla. Stat. 943.46-464 (1977)) which removes the maximum monetary limit to a fine that can be imposed and substitutes the following:

"A fine that does not exceed three times the gross value gained or three times the gross loss caused, whichever is the greater, plus court costs and the costs of investigation and prosecution, reasonably incurred."

Such a provision takes the place of an ill-gotten gains forfeiture provision, and it is an easier provision to work with because if it can be shown that the accused made a certain amount of money (whether or not it is known where this money went) a maximum fine of three times that amount can be levied. However, such a provision leaves the court with the same degree of discretion which it now has in Canada, since fines can be unlimited in amount here.

10. The maximum sentence should probably be life, to reflect the fact that many of the predicate offences (such as murder) have a maximum penalty of life imprisonment.

(2) In addition to any other sentence that may be imposed, everyone who commits an offence against any provision of this Part shall forfeit to Her Majesty

- (a) anything, whether real or personal, tangible or intangible, that has been acquired or maintained through the commission of an offence under this Part; and
- (b) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, acquired, operated, controlled, conducted, or participated in the conduct of, in violation of this Part.

For reasons given earlier in this paper, we have recommended the enactment of a reverse onus provision applicable to section 1962(a) offences (investing of dirty money in a legitimate business). We suggest that, after the prosecution has proven a pattern of criminal activity and has also proven the acquisition of any interest in an enterprise during the time when the criminal activity was being carried out, the onus shifts to the accused. He should have to prove, on the balance of probabilities, that the interest in question was not acquired with the proceeds of criminal activity. If he is unable to satisfy this onus, then he may be convicted of a laundering offence notwithstanding the lack of evidence tracing money from the criminal activity to the purchase of the interest.

By the same logic and for the same reasons, the onus of proof should be reversed after conviction during a forfeiture hearing. Where the Crown is seeking forfeiture of the profits derived from a pattern of criminal activity, the profits derived from a R.I.C.O. offence, or of any interest, etc., in an enterprise which was the subject of a R.I.C.O. offence, the onus should be reversed. If the Crown has demonstrated during the preceding trial, or if the Crown is able to demonstrate during the forfeiture hearing, that any asset was acquired during the time a pattern of criminal activity was occurring, then the asset should be deemed to be forfeitable unless the accused proves

(on the balance of probabilities) that he did not acquire his interest in the asset with dirty money. A typical section might read as follows:

In any proceeding under this Part, where it is established that anything, whether real or personal, tangible or intangible, was acquired by an accused at a time when he was participating in a pattern of criminal activity, or within 90 days after the pattern of criminal activity has terminated, the thing in question shall be presumed to have been acquired with the proceeds of the pattern of criminal activity unless the accused establishes that it was not so acquired.

This wording provides for the extension of the presumption to the 90-day period directly following the termination of the pattern of criminal activity, in recognition of the fact that profits from criminal activity may often be received well after the act has been completed.

What type of evidence is necessary to rebut this suggested presumption? In our submission, it should be evidence that proves the legitimate acquisition of the property in question. Care should be taken that an accused is not able to escape forfeiture by proving that, although the property was acquired with the profits of criminal activities, they were different activities from those which were the subject of the trial. If there is likely to be doubt on this point, then a further provision should be inserted in the presumption.

It has been suggested to us that the accused be required to serve notice on the Crown of any evidence he intends to call in rebuttal of the presumption, to allow the Crown time to verify the accused's explanation and prepare for cross-examination.¹¹ This suggestion should be considered.

11. This suggestion was made by Daniel Bellemare, a lawyer with the Federal Department of Justice in Montreal, P.Q. Mr. Bellemare commented on the difficulties in obtaining forfeiture under the Narcotics Control Act and suggested this as one change that might assist the situation.

(e) Restraining Orders

Section 1963(b) of the R.I.C.O. Statute makes provision for restraining orders in connection with property subject to forfeiture. We recommend one minor modification to the wording of the section. The subsection refers to "any action brought...under this section." Although the wording has not provoked argument of which we are aware, there is a possibility of confusion because section 1962 is the section that makes the conduct unlawful and section 1963 provides for penalties. We recommend substituting the words "under this part" for the words "under this section."

When making provision for restraining orders, consideration should be given to the time at which the restraining order can be issued. It must be possible to serve the restraining order on applicable third parties immediately before, or just as, the accused is formally charged, or the orders will often be ineffective.

It was suggested to us that provision be made to limit the court's discretion in granting or refusing a restraining order, as some American judges will only grant one upon proof of the likelihood of "irreparable harm."¹² In our opinion, there should be no onus on the prosecution to demonstrate "irreparable harm;" restraining orders should be available simply to preserve the status quo. We suggest that any Canadian legislation spell this out. It was also suggested that if a restraining order is refused, a performance bond should be mandatory. This suggestion should be given serious consideration if problems are likely to be encountered.

3. The Civil Provisions

We do not recommend the adoption of any part of section 1968, dealing with civil investigative demands, for the reasons set out previously in this report.

12. According to attorney E. Weiner, Strike Force 18, Department of Justice, in Washington, D.C., in a private conversation, February 26, 1980.

We recommend adding the word "person" to section 1964(c) so that a person who has been physically injured may also sue for triple damages.

Specific provision should be made to allow collateral estoppel to apply to private civil suits, as well as suits brought by the Attorney General, where the defendant has been previously convicted of the alleged misconduct.¹³

Consideration should be given to allowing the Attorney General to sue for damages. Although this is not expressly provided for in the American Statute, it is possible that the Attorney General is included in the definition of the word "person," and is accorded the right to sue for triple damages under section 1964(c). However, this is not clear and legislators may wish to make it so.

4. Procedural Matters

Because the R.I.C.O. Statute is drawn in broad terms, the possibility of inappropriate or abusive prosecutions will always exist. Therefore, consideration should be given to a requirement that the Attorney General of a province, or his deputy, must consent to any R.I.C.O. prosecution.

The procedural parts of the Criminal Code must be amended to incorporate the special problems involved in forfeiture. The Americans require that property subject to forfeiture be detailed in the indictment, and they require a "special verdict" after conviction. The "special verdict" requires that the judge or jury make a specific finding that certain property is owned by the accused and was used or acquired in violation of the Statute. Both of these procedures are safeguards designed to protect the rights of the accused person. If forfeiture provisions are adopted in Canada, provisions having a similar effect (such as ones requiring the Crown to serve notice on the accused that forfeiture will be sought and providing the accused with a right

13. See Chapter V, 105.

to appeal the forfeiture) should be provided for. Rules are also needed to set out what should be done with property after it is forfeited: how long it must be held to allow for appeals, how the rights of innocent third parties affected by the forfeiture will be dealt with, and whether the accused may "purchase" the forfeited interest from the government.¹⁴

(B) RELATED RECOMMENDATIONS: Regulatory Agencies and Public Education

That regulatory agencies can aid police in intelligence gathering is obvious. However, if the R.I.C.O. Statute is adopted, increased demands for information will be made upon regulatory agencies and a greater degree of coordination between agencies will be necessitated. The researchers are aware that in British Columbia the potential role of the regulatory agencies is recognized and an attempt is being made to increase efficiency in this area. We simply wish to emphasize the need for information on corporate structures, type and location of assets, sources of financing, and so on, if a R.I.C.O. Statute is to be successful and the forfeiture provisions used extensively. Consideration should be given to educating these agencies on criminal infiltration of business--how and why it is done and ways by which they might recognize "symptoms" of it. Consideration should be given to requiring the disclosure of "source funding" for high risk businesses.¹⁵ The feasibility of direct computer access by law enforcement personnel to the public information files of all, or some, of the regulatory agencies should be explored. With

14. There have been cases where the accused will offer a cash amount in lieu of having his business interest forfeited. This is objectionable because the object of forfeiture is to remove the accused from his business interests.

15. The Nevada State Gaming Commission requires disclosure of source funding and an extensive personal history, and they also require the license applicant to pay all costs of the investigation necessary to verify the information. There is no reason why such a scheme would not be feasible in high risk businesses in Canada.

direct access, public information can be retrieved without taxing the registry staff. We recommend that changes in this regard be made to facilitate computer retrieval of data held on public files in those agencies (such as the Office of the Superintendent of Brokers, Insurance and Real Estate, the Office of the Registrar of Companies, the Land Registry Office, and the Liquor Control Board) possessing information material to enterprise crime investigation.

Although this suggestion is hardly novel, we also recommend that increased attention be given to educating the public on the ramifications of enterprise crime. The so-called "victimless" crimes require willing "participants." These people should be aware of the size and profitability of the organization to which they are contributing by their purchase of illicit goods and services. To many, this information will make little difference, but to some it will. The same person who is outraged by heroin use and its related crime may be surprised to learn that his neighbourhood bookie is supported financially by the same organization that imports the narcotics.

APPENDIX "B"

OPINION:

USE OF CIVIL REMEDIES IN CRIME CONTROL

John W. Horn
Barrister and Solicitor
University of Victoria
(Practitioner in Residence 1979-80)

APPENDIX B

O P I N I O N

Use of Civil Remedies in Crime Control

1. INTRODUCTION

By letter of instructions dated January 15, 1980, I was asked to advise what civil remedies might be available to the Attorney General of Canada or the Attorney General of a province which would enable him to move against persons involved in, or to attach the proceeds or profits of, organized crime.

Research in this field has been undertaken by the United States National Association of Attorneys General, Committee on the Office of Attorney General, and I should mention immediately two publications emanating from that office which I have found helpful:

- (1) "The Use of Civil Remedies in Organized Crime Control"--July 1977,
- (2) "Common Law Powers of State Attorneys General"--May 1977.

In British Columbia, an excellent Working Paper upon which I have drawn heavily in this Opinion has been issued by the Law Reform Commission of British Columbia dealing, in part, with the common law powers of the Attorney General in the field of injunctions:

Working Paper No. 26, "Civil Litigation in the Public Interest"--September 1979.

Portions of this paper are annexed to this Opinion*and I will be making reference to it.

2. OBJECTS AND LIMITS TO OBJECTS

The object of effecting restitution or of collecting fines upon conviction is, it is assumed in this paper, adequately dealt with by the procedures set out in the Criminal Code or in provincial summary

* On file with the office of Crown Counsel, Vancouver, B.C.

conviction statutes and I was specifically instructed not to deal with these matters.

The prime object of any civil intervention on the part of an Attorney General must, it seems to me, be crime prevention, and it is apparent that such object may be pursued directly (for example, by use of injunctions to prohibit the criminal activity) or indirectly, by making crime uneconomic (for example, by forfeitures) or by the exposure of the involvement of criminals in apparently non-criminal activities and associations.

A further object must be considered, since to a great extent the remedies discussed below are fenced about with rules antagonistic to the achievement of this object. That object is the substitution of civil proceedings for criminal proceedings because of the greater reach of the former by way of discovery techniques and coercive orders.

The criminal law process is notoriously deficient in "discovery" procedures. Information leading to the uncovering of criminal activities or to the tracing and recovery of the proceeds of crime cannot, without their cooperation, be obtained directly from the criminal or his associates. The investigative conduct of the Crown's servants is strictly controlled and the burden of proof lies heavily on the Crown.

The civil process on the other hand coerces such full disclosure, not only from parties but from witnesses, and punishes by committal for contempt or by the granting of default or summary judgments the inclination of a defendant or a witness to remain silent in the face of accusation. No person may purchase a cessation of attack by civil process by the payment of a given penalty whether fine or forfeiture or imprisonment, since the power to punish for contempt is, in theory, unlimited and unending.

.It is indeed then tempting to consider turning to the civil process either

to supplement the procedural deficiencies of the criminal law process or as a substitute in cases where that process has historically failed to prevent criminal activities.

The chief objection to the use of civil process to enjoin criminal activity has been recently and forcefully restated in the House of Lords in the case of Gouriet v. U.P.W. (1978) A.C. 435 (by Lord Diplock at p. 498) where, in discussing the power of the Attorney General to apply for an injunction against unlawful conduct, his Lordship said:

The very creation by Parliament of a statutory offence constitutes a warning to potential offenders that if they are found guilty by a court of criminal jurisdiction of the conduct that is proscribed, they will be liable to suffer punishment up to a maximum authorized by the statute. When a court of civil jurisdiction grants an injunction restraining a potential offender from committing what is a crime but not a wrong for which there is redress in private law, this in effect is warning him that he will be in double jeopardy, for if he is found guilty by the civil court of committing the crime he will be liable to suffer punishment of whatever severity that court may think appropriate, whether or not it exceeds the maximum penalty authorized by the statute and notwithstanding that he will also be liable to be punished again for the same crime if found guilty of it by a court of criminal jurisdiction. Where the crime that is the subject matter of the injunction is triable on indictment the anomalies involved in the use of this exceptional procedure are enhanced. The accused has the constitutional right to be tried by a jury and his guilt established by reference to the criminal standard of proof. If he is proceeded against for contempt of court he is deprived of these advantages.

A similar warning was expressed by MacKeigan, C.J.N.S. of the Appeal Division of the Nova Scotia Supreme Court in Shore Disposals Ltd. v. Ed de Wolfe Trucking Ltd. (1976) 72 D.L.R. (3d) 219 at 226:

Basic freedoms may be grossly infringed by a person thus being convicted in civil proceedings without the protection of the criminal laws of burden of proof and evidence including the ban against self incrimination.

These comments were made in the course of judgments in proceedings where

a discretion was vested in the court to grant the relief sought (either an injunction or a declaratory order) and might on the face of it be thought to be confined to circumstances where such a discretion is to be exercised. It must, however, be apparent that, even in cases where no discretion exists, the doctrine of "abuse of process" which is well established in our law would authorize a court, on much the same grounds as expressed above, to dismiss or to stay proceedings brought with an ulterior motive.¹ If the Attorney General deliberately chose to use civil process for the purpose of obtaining an advantage denied by the use of criminal process then such use might well be thought to be an abuse.

Nevertheless the fact is that there is no general principle that the existence of a criminal remedy deprives the court of jurisdiction to grant civil remedies. The field in which it is permissible for both remedies to be invoked may have been expanded from time to time, but any further move to expand must be prepared to face the objections expressed in the extracts set out above.

With these considerations in mind, I turn to consider what remedies may yet be available to enjoin or inhibit criminal conduct.

3. FORFEITURE AT COMMON LAW

There is no principle of our common law that property obtained with the proceeds of a crime or the profits of a criminal way of life are liable to forfeiture. There was, at common law, a forfeiture or escheat of property upon conviction of a felony, but that was not because the property forfeited was traceable, actually or fictionally, to the crime committed but because there was a general forfeiture as a necessary consequence of a conviction for felony though not part of any sentence. The origin of this forfeiture was probably the concept that a felony was

1. As to the doctrine of abuse of process see Hollinger Buslines v. Ontario Labour Relations Board [1951] 4 D.L.R. 47; and Bodrogi v. Vulcan Industries Ltd. [1975] 3 W.W.R. 764.

a breach of a feudal duty and resulted in an escheat to the feudal lord of everything held through him.².

All such general forfeitures were, however, abolished in Canada in 1892 upon the introduction of the Criminal Code of that year (see section 965 of the Criminal Code of 1892) and consequently only statutory forfeitures now exist.

4. FORFEITURE UNDER STATUTE

There is curiously, under the Criminal Code, no general provision that things obtained by or used in the commission of an offence may be forfeited nor is there any such provision in, for example, the Summary Convictions Act of British Columbia. The nearest that either statute comes to any such general principle is contained in s. 446(3) of the Criminal Code and in s. 16 of the Summary Convictions Act, R.S.B.C. 1960, c. 373, which provide that where anything has been seized under a search warrant (the thing having been obtained or used in the commission of an offence) it may in certain circumstances be forfeited, if possession of it by the person from whom it was seized is unlawful. These provisions obviously do not justify general forfeitures of things acquired by the proceeds of crime.

There are, of course, numerous provisions authorizing forfeiture in specific cases to be found in the Criminal Code. For example, counterfeit money (s. 452), gaming instruments (s. 181(3)) and weapons used in the commission of an offence (s. 446(1)). The true owner of a thing (including money) obtained by the commission of an offence can trace and recover the thing if still identifiable, but this is of course not a forfeiture.³.

2. See Kenny's Outlines of Criminal Law, 18th edition, sections 73 to 77.

3. See Snell's Principles of Equity, 27th edition, p. 285.

5. ESCHEATS

The British Columbia Crown Franchises Regulations Act (R.S.B.C. 1960, c. 88, ss. 4 and 6) provides that the court may at the instance of the Attorney General judge that any corporation shall surrender or forfeit its corporate rights, privileges or franchises, and one of the grounds of such forfeiture is that the corporation is "committing or omitting an act which amounts to or constitutes a surrender or forfeiture of its corporate rights, privileges or franchise" or is "misusing a franchise or privilege conferred upon it by law."⁴ Upon forfeiture of the charter of a company, the property of the company both real and personal escheats to the Crown.⁵ It seems clear that the Attorney General has a common law right to maintain an action for the annulment of the charter of a corporation because of its misuse or abuse.⁶

What is meant by misuse of a franchise or privilege is difficult to say. But in Attorney General of Canada v. Hellenic Colonization Association [1946] 3 W.W.R. 482, Farris CJSC, dealt with an application where the facts were that a company incorporated with a Dominion charter established branches throughout British Columbia and Alberta and that numerous managers of club premises franchised by the corporation had been convicted for unlawfully keeping a common gaming house. The Chief Justice at p. 490 held:

Isolated cases of abuse or misuse should not be sufficient for a declaration of annulment. The abuse or misuse must be of such a nature as to be offensive to public policy. To my mind the abuse or misuse must be of such consecutive acts and the general policy of the association such as would indicate a clear intention that the company

4. This Act appears to be the replacement for the old writ of scire facias.
5. See s. 5 of Escheats Act, R.S.B.C. 1960, c. 132; Re Quieting Titles Act Re Lincoln Mining Syndicate Ltd. v. Reg. (1958) 26 W.W.R. 145. (Leave to appeal refused 1959 S.C.R. 736.)
6. See Attorney General of Canada v. Hellenic Colonization Association [1946] 3 W.W.R. 482 (B.C.S.C.).

or association wished to use the charter as a mere cloak for its improper acts.

The charter in this particular case was annulled.

It is apparent, therefore, that the remedies of forfeiture of charter and escheat are of somewhat limited use in the fight against organized crime.

6. INJUNCTIONS

It is well established that upon the application of the Attorney General a court may grant an injunction for the purpose of suppressing or abating a "public nuisance" (see text and cases cited in the British Columbia Law Reform Commission Working Paper No. 26 at pp. 30-32). It is also well established that the court may enjoin at the instance of the Attorney General a breach of a statute where "public rights" are involved even though no nuisance is created (see British Columbia Law Reform Commission Working Paper No. 26, pp. 38-45).

An example of a "public nuisance" is the holding of a rock festival in circumstances which threaten public health and morals.⁷ Another example of a nuisance which (though dealt with as a private nuisance) would clearly also be a public nuisance is the conducting of a house of prostitution.⁸

An example of a case where there was an involvement of "public rights" which led the court to grant an injunction is the carrying on of a cartage business without a licence.⁹

But if this is so is it not arguable that practically every breach of a

7. Attorney General for Ontario v. Orange Productions (1971) 21 D.L.R. (3d) 257 (Ont. H.C.).

8. See Thompson-Schwab v. Costaki [1956] 1 All E.R. 652.

9. See Attorney General for Ontario v. Grabarchuk (1976) 11 O.R. 607; Attorney General v. Premier Line Ltd. [1932] 1 Ch. 303.

statute imposing criminal sanctions involves either a "public nuisance" or a breach of "public rights" and that accordingly injunctive relief is available?

That the courts would refuse to enjoin conduct which was punishable under the criminal law used, at one time, to be forcefully asserted. In Robinson v. Adams [1925] 1 D.L.R. 359 (Ont. C.A.), Middleton, J.A. said at p. 364:

The equitable jurisdiction of a civil court cannot properly be invoked to suppress crime. Unlawful acts which are an offence against the public and so fall within the criminal law may also be the foundation of an action based upon the civil wrong done to an individual, but when parliament has in the public interest forbidden certain acts and made them an offence against the law of the land then, unless a right to property is affected, the civil courts should not attempt to interfere and forbid by their injunction that which has already been forbidden by parliament itself. Much less should the courts interfere when the thing complained of is not within the terms of the criminal law, although it may be rightly regarded as objectionable or even immoral, for then the civil courts by injunction are attempting to enlarge and amend the criminal law. Government by injunction is a thing abhorrent to the law of England and of this province.

The same view was expressed in the British Columbia decision Attorney General v. Wellington Colliery Company (1903) 10 B.C.R. 397, where it was held by Irving, J.:

This court does not grant an injunction for the purpose of enforcing moral obligations nor for keeping people without the range of the criminal law.

This strict view has recently been reasserted by the House of Lords in Gouriet v. U.P.W. (1978) A.C. 435.

Nevertheless it has always been clear that a public nuisance could at any rate be enjoined, even though the conduct complained of was also an offence, and even though public nuisance is itself an offence under the

Criminal Code¹⁰. and there is a long line of authority to the effect that even where a nuisance is not being created, where a defendant has persistently flaunted the law and the sanctions of the criminal law have proven to be insufficient, further breaches will be enjoined at the instance of the Attorney General.¹¹

How then can a distinction be drawn between those cases where the courts will enjoin future threatened criminal conduct and those where they will not? The distinction appears to lie in the circumstance that there is repetitious conduct either in the form of a continuing nuisance or in the form of a persistent flaunting of the law. Where there are threatened but isolated breaches of the criminal law, an injunction will not normally be granted. Persistence must be shown.

7. CONCLUSION

In my opinion, the courts are unlikely to move further than they already have in the direction of granting injunctions against threatened conduct constituting a crime. Nor can I foresee that, without a statutory intervention, any principle will emerge which will enable a court at the instance of the Attorney General to attach or forfeit property or monies gained by a criminal way of life. Nevertheless, within the restricted bounds of the remedies discussed above and the restrictive attitude of the courts in the implementation of these remedies, there may yet be room for imaginative use of civil process for the purpose of discouraging or eliminating organized criminal activities.

It seems to me that the persistent use of premises for the purposes of prostitution or the sale of drugs or the sale of stolen goods, whether or not the owner or manager of the premises is party thereto, may constitute a public nuisance. It also appears to me that the continued presence on

10. See A.G. v. Ewen (1895) 3 B.C.R. 468.

11. See Attorney General v. Sharp (1932) 1 Ch. 121; Attorney General v. Harris [1960] 3 All E.R. 207 (C.A.). The authority of these decisions has not been impugned by the decision in Gouriet (see judgment of Lord Diplock at p. 500 and of Viscount Dilhorne at p. 491).

particular streets of particular prostitutes may well be regarded as a nuisance for which the Attorney General might obtain an injunction. It seems fair on the basis of the authorities to conclude that continuous and intentional violation of criminal law is a public nuisance and that this might include the operation of bawdy houses, gambling dens, loan-sharking operations, extortion and other conduct normally associated with the existence of organized crime.

8. ADVANTAGES

The advantages of pursuing the civil remedies are obvious. Discovery procedures are available and amendment of proceedings is easily obtained, as is the addition of parties. The burden of proof is lighter. Witnesses may be compulsorily examined under oath if unwilling to give information. Finally, the power of committal for contempt for failure to obey a subpoena or to give evidence, or upon failure to obey an injunction, is a tremendous weapon.

Nevertheless, the conclusion must be that to revert to civil process for the express and sole purpose of obtaining such advantages is likely to be met with appropriate resistance by the courts.

J.W. Horn
University of Victoria

May 8, 1980

APPENDIX "C"

OPINION RE CONSTITUTIONALITY OF POTENTIAL CANADIAN
FEDERAL LEGISLATION SIMILAR TO THE AMERICAN
RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS
(R.I.C.O.) LEGISLATION

James C. MacPherson
Visiting Professor of Law
Osgoode Hall Law School
Toronto, Ontario

OPINION RE CONSTITUTIONALITY OF POTENTIAL CANADIAN FEDERAL LEGISLATION
SIMILAR TO THE AMERICAN RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS
(R.I.C.O.) LEGISLATION

I have been asked to prepare an opinion assessing the constitutionality of potential Canadian federal legislation similar to the United States Racketeer Influenced and Corrupt Organizations (R.I.C.O.) legislation.

I have organized this Opinion around three broad areas:

- (1) Questions of Substantive Law
- (2) Questions of Procedure
- (3) Questions of Penalties and Remedies.

In preparing the Opinion, I have attempted to respond to the questions posed by Robert C. Simson, Director, Coordinated Law Enforcement Unit, Ministry of the Attorney General, in his memorandum of 14 April 1980 to Mel Smith, Deputy Minister, Ministry of Inter-governmental Affairs. I have modified and supplemented those questions somewhat following conversations with A.G. Henderson, Regional Crown Counsel, Ministry of the Attorney General, who is the person heading up the study concerning possible Canadian R.I.C.O. legislation.

QUESTIONS OF SUBSTANTIVE LAW

- (1) Sections 1962(a), (b), (c) all make reference to the "collection of an unlawful debt" which is defined in section 1961. As "unlawful debts" are created by both federal and provincial legislation and regulation, is there a constitutional problem in defining this phrase?

There is no constitutional difficulty in defining the phrase "unlawful debt" in a Canadian federal R.I.C.O. statute.

It is true that provincial legislation does define and proscribe certain unlawful debts. It is also true that such provincial legislation is often constitutional. For example, the Ontario Unconscionable Transactions Relief Act was upheld by the Supreme Court of Canada in Attorney General (Ontario) v. Barfried Enterprises Ltd., [1963] S.C.R. 570. More recently, in Robinson v. Countrywide Factors Ltd., (1977) 72 D.L.R. (3d)

500, the Supreme Court upheld section 4 of the Saskatchewan Fraudulent Preferences Act which prohibited a person from paying some creditors in preference to others when he knows himself to be on the brink of insolvency.

But the existence and constitutionality of provincial legislation relating to debt is irrelevant when considering whether Parliament can legislate in the same area. If the subject matter of a federal enactment can be grounded in a head of section 91 of the British North America Act (B.N.A. Act), then the enactment is constitutional. This conclusion is not altered by the fact that there may be similar, and valid, provincial legislation dealing with the same subject matter. The existence of provincial legislation does not influence the determination of whether a federal statute is constitutional. Indeed, it is the opposite relationship that poses constitutional difficulties. Because of the paramountcy doctrine a provincial statute, initially valid when viewed in isolation, may be declared inoperative for a time because of the existence of similar federal legislation in the same area. But, because the paramountcy doctrine is one of federal paramountcy, a valid federal statute will not have to be measured against the yardstick of a valid provincial statute in the same area. Overlapping legislation poses potentially serious problems for provincial legislation. It poses no problems for federal legislation.

The only question then is whether a federal definition and proscription of "unlawful debt" could be supported under section 91 of the B.N.A. Act, specifically head 27.

The accepted definition of Parliament's criminal law power was enunciated by Rand J. in the Margarine Reference case, [1949] S.C.R. 1 at 40:

Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law.

It can be seen that a federal statute will be valid under the criminal

law power if three conditions are met: (1) the law must prohibit certain conduct; (2) for a public purpose; and (3) it must attach penalties or sanctions to the prohibition.

A Canadian R.I.C.O. statute would easily comply with these conditions. It (1) would prohibit four types of activity; (2) for purposes of public morality and order; and (3) it would contain severe and diverse penalties.

It is true that in three recent cases the Supreme Court of Canada has refused to uphold certain federal legislation under s. 91(27) of the B.N.A. Act. But the decisions of the Court in MacDonald v. Vapour Canada Ltd., (1976) 66 D.L.R. (3d) 1, Regina v. Hauser, (1979) 98 D.L.R. (3d) 193 and Labatt Breweries v. Attorney General (Canada), Unreported decision, 21 December 1979, involved federal legislation that was significantly different than R.I.C.O. legislation. In Vapour Canada the prohibition against using a certain type of trademark was not accompanied by a penalty for non-compliance with the legislation. This belied its criminal character. In Hauser the issue was primarily one of prosecutorial jurisdiction, not substantive criminal law. In Labatt the Court held that federal legislation prohibiting the labelling of beer in a certain way unless the beer complied with federal standards was not criminal law; rather it was a colorable attempt to regulate the products of a single business (and an intraprovincial one at that). All of these fact situations are well-removed from the factual context of projected R.I.C.O. legislation. A R.I.C.O. statute would be directed towards racketeering activity. It would have as a primary goal the reduction of such crimes as arson, embezzlement, fraud, gambling, loansharking, prostitution and bribery of political and judicial figures. As such it clearly and easily fits within the parameters of criminal legislation.

- (2) "Enterprise" is restricted in Sections 1962(a), (b) and (c) as one "engaged in, or the activities of which affect, interstate or foreign commerce." Is this restriction or a variation thereof necessary if it is proposed as federal legislation in Canada?
-

It would not be necessary in a Canadian federal R.I.C.O. statute to restrict the definition of enterprise to corporations or individuals engaged in interprovincial or international commerce.

There is a constitutional reason for the limited American definition of enterprise. In the United States jurisdiction over criminal law matters is vested in the states. Accordingly, if Congress wants to legislate in this area it must rely on some other head of power. Article I, Section 8(3) which grants Congress the power "to regulate commerce with foreign nations, and among the several states" has proved to be the most useful federal power in this regard. It has enabled Congress to legislate with respect to criminal matters, provided that the proscribed criminal activity or those engaged in it have connections with more than one state. Hence the American R.I.C.O. statute is constitutional, but not under a federal criminal law power because there is none. Rather, because of the narrow definition of enterprise, the R.I.C.O. statute is constitutional under the interstate commerce clause of the Constitution.

In Canada, of course, jurisdiction over criminal law matters is vested in Parliament. Therefore, when Parliament wants to define certain conduct as criminal it can do so directly on the basis of section 91(27) of the B.N.A. Act. Parliament does not have to do what the American Congress does--namely, look for another head of power on which to mount criminal legislation.

In summary then, a Canadian R.I.C.O. statute could prohibit, on criminal law grounds, certain activities of all enterprises. It would not be necessary for either the enterprise or the prohibited activity to be interprovincial or international in character.

QUESTIONS OF PROCEDURE

(3) Could Parliament enact a "reverse onus" evidentiary clause to aid in tracing the proceeds of criminal activity?

There are a large number of reverse onus clauses in the Canadian Criminal Code. Examples are found in sections 16(4), 50(1)(a), 80, 94, 102(3), 106, 110(1)(b), 133(b), 139(2), 139(3), 159(3), 173, 179(3), 193(4), 197(2), 237(1), 243(2), 247(3), 253(2), 254(4), 258(a), 267(1), 275, 280(1), 299(5), 307(1), 309(1), 310, 320(4), 327, 334(b), 334(c), 341(2), 352(1)(c), 360(2), 363, 367(2), 375(1)(a), 375(2), 377, 378(3), 386(2), 396, 408, 409, 410, 415(3), 416, 417 and 730(2).

Reverse onus clauses are also found in other federal statutes. Examples include the Narcotic Control Act, sections 7(2) and 8 and the Food and Drugs Act, sections 29, 31(4), 35(3), 36(2), 43 and 44.

There can be no doubt that Parliament has the constitutional authority to enact reverse onus clauses in its criminal legislation. Section 91(27) of the British North America Act grants Parliament the power to make laws in relation to "the criminal law...including the procedure in criminal matters." (emphasis added).

Although the outer reaches of Parliament's criminal procedure power are uncertain, it is clear that, at a minimum, the power extends to trial practice and matters closely related to trial practice. As Pigeon J. said in DiIorio and Fontaine v. Warden of Common Jail of Montreal, (1976) 35 C.R.N.S. 57 at 69: "Once a charge is laid under the Criminal Code an accused may be said to be subject to criminal proceedings." In the same case Dickson J. said, at p. 82: "The phrase 'criminal procedure'...is concerned with proceedings in the criminal courts and such matters as conduct within the courtroom, the competency of witnesses, oaths and affirmations, and the presentation of evidence." (emphasis added).

Reverse onus clauses are clearly evidentiary in nature and operate within

a trial setting, that is after a charge has been laid. They easily fall, therefore, within section 91(27) of the B.N.A. Act.

The more substantial constitutional question is whether reverse onus clauses violate section 2(f) of the Canadian Bill of Rights which provides that federal laws must be construed and applied so as not to "deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law."

The Supreme Court of Canada answered this question in Regina v. Appleby, [1972] S.C.R. 303. Section 237(1)(a) of the Criminal Code provides:

- 237(1) In any proceedings under section 234 or
- (a) 236 where it is proved that the accused occupied the seat ordinarily occupied by the driver of a motor-vehicle, he shall be deemed to have the care and control of the vehicle unless he establishes that he did not enter or mount the vehicle for the purpose of setting it in motion.

A unanimous Court held that section 23(1) did not violate section 2(f) of the Canadian Bill of Rights. Ritchie J. said that "the words 'presumed innocent until proved guilty according to law' as they appear in s. 2(f) of the Canadian Bill of Rights, must be taken to envisage a law which recognizes the existence of statutory exceptions reversing the onus of proof with respect to one or more ingredients of an offence in cases where specific facts have been proved by the Crown in relation to such ingredients." (p. 316). Laskin J., in a concurring judgment, stated that the presumption of innocence protected by section 2(f) "does not preclude either any statutory or nonstatutory burden upon an accused to adduce evidence to neutralize, or counter on a balance of probabilities, the effect of evidence presented by the Crown." (p. 318).

Two final points about reverse onus clauses should be made. First, the Appleby case and the passages cited above from the judgments by Ritchie and Laskin JJ. indicate that reverse onus clauses can operate only at the second stage of the evidentiary process. The Crown must establish the

existence of certain facts beyond a reasonable doubt (for example, in Appleby, that the accused was in the driver's seat). Then, and only then, does the burden shift to the accused to explain those facts (for example, in Appleby, that he did not intend to set the vehicle in motion). A wider reverse onus clause, namely one requiring that the accused disprove all the relevant facts, would probably violate section 2(f) of the Canadian Bill of Rights. Thus care should be taken in drafting the reverse onus clause in the Canadian equivalent of the R.I.C.O. statute. The clause should make clear that the burden shifts only after the Crown has established certain initial relevant facts. Thus a clause could provide that the Crown would have to show that the accused was in possession of certain assets. Then the reverse onus clause could shift the burden to the accused to establish that those assets were not used for an illegal purpose.

Secondly, the Appleby case indicates that it will not be sufficient for the accused to discharge the onus by raising a reasonable doubt about his use of the assets for an illegal purpose. Rather, as Laskin J.'s judgment makes clear, he will be able to discharge the onus only by establishing on a balance of probabilities that he did not use the assets for illegal purposes.

QUESTIONS OF PENALTIES AND REMEDIES

- (4) Section 1963 deals with criminal penalties and of concern is the one relative to "Criminal Forfeiture." Is this a provision within federal competence?

A criminal forfeiture provision in a Canadian federal R.I.C.O. statute would be constitutional.

Section 1963 of the American R.I.C.O. statute provides:

- (a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States
 - (1) any interest he has acquired or maintained in

violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

It should be pointed out there is no novelty, in a Canadian context, in the idea of criminal forfeiture penalties. Several sections of the Criminal Code (for example, s. 420--counterfeit money; s. 181--gaming instruments; s. 189(5)--lottery material; ss. 88 and 96--offensive weapons; ss. 352, 353, 446, 477--goods seized under a search warrant; s. 287.1(2)--illegal telecommunication devices) provide for criminal forfeiture.

The constitutionality of these provisions and of a criminal forfeiture provision in a Canadian federal R.I.C.O. statute are assured by two decisions of the Supreme Court of Canada, Johnson v. Attorney General (Alberta), [1954] S.C.R. 127 and Regina v. Zelensky, [1978] 3 W.W.R. 693.

In Johnson, the Alberta Slot Machine Act which provided for, inter alia, forfeiture of slot machines was declared unconstitutional. The six majority justices cited different reasons for this conclusion. For some, the Alberta statute failed because it was inherently criminal and therefore not supportable under any head of section 92 of the B.N.A. Act. For others, it was sufficient to hold that the Alberta legislation conflicted with provisions of the Criminal Code, including provisions relating to criminal forfeiture. The key point for our purposes, however, is that all the justices were agreed that the forfeiture provisions of the Criminal Code were constitutional. As Rand J. said: "The penalty of the [Alberta] Act, in duplicating forfeiture, is supplementing punishment." (p. 138, emphasis added). Thus it is clear that the Court regarded forfeiture as being related to punishment which in turn is an essential feature of the criminal law.

The Zelensky case, although it did not concern criminal forfeiture

provisions, is perhaps even stronger authority for their constitutionality. In that case the Court considered section 653(1) of the Criminal Code which permitted a court to order compensation and restitution to the victim of a crime. The compensation and restitution would be paid by the convicted person as part of the sentence imposed on him.

Chief Justice Laskin, writing for the majority (the voting was 6-3), held that sentencing comes within section 91(27) of the B.N.A. Act (p. 699, citing Toronto v. The King, [1932] A.C. 98) and then upheld compensation and restitution because "s. 653 is valid as part of the sentencing process." (p. 709).

The Zelensky decision is particularly useful when considering a potential Canadian equivalent to section 1963 of the American R.I.C.O. statute because the compensation and restitution provisions of s. 653(1) of the Criminal Code were upheld even though there were two important facts which cast doubt on the tightness of the fit between the compensation and restitution penalties and the criminal sentencing process. First, compensation and restitution could be included in a criminal sentence only if the victim requested them. Secondly, an order for compensation or restitution was enforceable in provincial superior courts "in the same manner as if it were a judgment rendered against the accused in that court in civil proceedings." (s. 653(2)). Taken together, these facts arguably cast doubt on the real focus of s. 653(1). The three dissenting justices felt that these facts showed that s. 653(1) was really a colorable attempt to legislate in relation to civil rights within a province, a subject matter vested in the provinces by s. 92(13) of the B.N.A. Act. But the majority did not think that these two facts detracted from the primary purpose of s. 653(1), namely the imposition of penalties (admittedly creative ones) on persons convicted of criminal activities.

Section 1963 of the American R.I.C.O. law contains neither of the two shadows contained in s. 653(1) of the Canadian Criminal Code. The

criminal forfeiture provision is a pure part of a sentence in a criminal case. It does not depend on a request by the victim of the defendant's criminal activity or on civil enforcement or on any other factor. Section 1963 is, therefore, a "pure" sentencing provision. This purity is not potentially diluted by any extraneous factors such as those found in s. 653(1). Since the "impure" (relatively speaking) criminal penalties in s. 653(1) were upheld in Zelensky by the Supreme Court of Canada, that case stands as strong support for the "pure" criminal forfeiture provisions that might be included in a Canadian R.I.C.O. law.

Incidentally, while on the topic of criminal penalties in a potential Canadian R.I.C.O. statute, it should be pointed out that the philosophy and language of Zelensky make it probable that other possible R.I.C.O. penalties would be constitutional--provided that they were imposed as part of a sentence in a criminal case. Having stated that s. 653(1) of the Criminal Code was valid as part of the sentencing process, Chief Justice Laskin continued, at p. 709:

The constitutional basis of s. 653 must, in my opinion, be held in constant view by a judge called upon to apply its terms. It would be wrong, therefore, to relax in any way the requirement that the application for compensation be directly associated with the sentence imposed as public reprobation of the offence.
(emphasis added)

Although this passage has potentially serious implications for legislative provisions which establish civil remedies completely divorced from a criminal proceeding or the criminal sentencing process (see next section of this Opinion), the positive side of the passage is that it tends to indicate that civil-like remedies will be constitutional if tied closely to criminal sentencing. Thus if a Canadian equivalent of s. 1963 provided for not only criminal forfeiture but also for dissolution or divestiture of an enterprise that used legally obtained money for illegal purposes or illegally obtained money for legal purposes, or permitted a judge to order a convicted person not to participate in union activities or government activities because he had engaged in illegal

conduct in those activities in the past, the Zelensky case would likely support these penalties because they would be "directly associated with the sentence imposed as public reprobation of the offence." The lesson to be drawn from Zelensky is that even if Parliament cannot constitutionally impose creative penalties in a civil context the same goal can be achieved, by and large, by making those penalties part of a criminal sentence.

Finally, one possible pitfall relative to Parliament's power to create criminal forfeiture or other penalties in a Canadian R.I.C.O. law should be mentioned. If the penalty section is drafted too widely, then a court might hold that it is a colorable provision constituting an unwarranted interference with an individual's (either the defendant's or an innocent third party's) civil rights (I use this term in the sense intended by s. 92(13) of the B.N.A. Act, not in a "civil liberties" sense). Two examples can be used to illustrate this point. In both examples assume that the Canadian R.I.C.O. statute called for criminal forfeiture of an enterprise if the defendant "laundered" through the enterprise money obtained through illegal activities.

Example No. 1: Jones buys a hotel for 1 million dollars. He pays for the hotel with \$900,000 obtained through legal business activities and \$100,000 obtained through illegal gambling and loansharking. Would a provision allowing a court to order forfeiture of the entire enterprise be constitutional? At least one Canadian judge has suggested that such a provision would be unconstitutional. In Regina v. Smith, (1976) 27 C.C.C. (2d) 257, Mr. Justice Addy of the Federal Court, Trial Division, said, in obiter, at p. 256:

I might add that if, in enacting these subsections [criminal forfeiture provisions in the Narcotic Control Act], the Parliament of Canada did purport to provide that any money whatsoever, seized in a police raid

under the Narcotic Control Act, including money which is not eventually connected with the commission of the criminal offence, would be forfeited to the Crown...these provisions would be ultra vires as infringing on the property and civil rights jurisdiction of the Province." (emphasis added)

My own view is that such a penalty, although very harsh, could be constitutional on the theory that it is still a penalty directed exclusively at the convicted criminal. The sentence is related to the crime and it has no spillover effects on innocent parties. But, whatever the ultimate answer, it is clear that a provision calling for forfeiture of both legally and illegally obtained assets sails close to the line demarcating criminal law from civil rights.

Example No. 2: Jones and Brown buy a hotel for 1 million dollars. Jones puts up \$500,000 obtained through illegal activities. Brown's \$500,000 is not tainted in any way. Would a provision allowing a court to order forfeiture of the entire enterprise be constitutional? Here I think the answer would be 'no'. Although the section may be intended to punish Jones for his criminal activity, the spillover effects constitute a serious infringement on the civil rights of Brown. In this case I think a court would either declare the section unconstitutional or read it down so as not to apply to this type of fact situation.

In summary, a Canadian R.I.C.O. law that provided for criminal forfeiture would be constitutional. Other penalties such as dissolution or divestiture of the tainted enterprise would also be constitutional provided that

those penalties were imposed as integral parts of a sentence in a criminal case. Care should be taken, however, in drafting such penalty provisions. A constitutionally safe section would provide for forfeiture of only those assets or dissolution of only those enterprises (or parts of enterprises) which were tainted with illegal conduct. A constitutionally safe section would also be one which had no effect on innocent third parties.

- (5) Section 1964 deals with civil remedies including divestiture and dissolution of the enterprise. It also provides for status in the hearing for both the Government and private parties and as well sets out provision for triple damages.
Are these provisions constitutional?

Section 1964 of the American R.I.C.O. law permits the Government and private parties to initiate a civil suit against a person who has violated the criminal provisions of the statute. Although the civil suit must be based on the defendant's criminal activity which violates the substantive criminal sections of the law, the suit can be initiated without there being any parallel criminal proceedings against the defendant. If the plaintiff Government or private party (the victim of the defendant's actions) establishes a violation of the substantive criminal sections then a court may order a wide array of civil remedies against the defendant. Dissolution or divestiture of assets or the enterprise (or even orders restraining offenders from engaging in union or government activities, the Americans believe) could be ordered. Injunctive relief in the form of a prohibition against the defendant engaging in similar activity in the future could also be ordered. Furthermore, and of great significance from the victim's perspective, if he initiates a civil suit and makes out his case the court must order that the defendant pay him triple damages for the loss he has suffered plus the costs of the suit.

There are two contexts in which section 1964 could be incorporated into Canadian federal legislation. First, Parliament could establish these civil remedies as potential penalties which courts could impose as part of a criminal sentence following a criminal trial. Secondly, and much

more broadly, Parliament could additionally make these remedies available, as the United States has done, in pure civil settings completely divorced from, and not dependent on, parallel criminal proceedings. Because the constitutional considerations are markedly different I will treat these two possible legislative contexts separately.

A. Civil Penalties/Remedies as part of a Criminal Sentence

The decision of the Supreme Court of Canada in Regina v. Zelensky, [1978] 3 W.W.R. 693, stands for the proposition that civil remedies enacted by Parliament in criminal legislation are constitutional if they are imposed as part of a sentence following a criminal trial. Although compensation and restitution orders confer a benefit on the victim of the crime, Chief Justice Laskin emphasized that these orders were "directly associated with the sentence imposed as the public reprobation of the offence" and were, therefore, "valid as part of the sentencing process." (p. 709).

On the reasoning and holding of Zelensky it is likely that the civil remedies Parliament might provide for in a Canadian section 1964 of a R.I.C.O. statute would also be upheld by the Supreme Court of Canada, provided that those remedies were ordered by a court as part of a criminal sentence. The Court should have little difficulty finding that remedies such as divestiture and dissolution are primarily intended to penalize the offender (the traditional focus of sentencing policy) and that the specific remedies are rationally related to the criminal activity which Parliament is attempting to curtail.

The fact that the victim of the crime would be given standing at the criminal hearing would not alter this conclusion. In Zelensky the victim had to initiate the request for the civil remedies and yet the Supreme Court of Canada concluded that s. 653(1) of the Criminal Code was still primarily directed at punishing the offender. The role of the victim in criminal R.I.C.O. proceedings is less obtrusive than his role under s. 653(1) in that, although he can be granted standing at the trial, the

ordering of the civil remedies could still flow from the Government-initiated criminal case, not necessarily from the request of the victim. Therefore a Canadian s. 1964 would be even less subject to attack on grounds of being a colorable attempt to provide a victim with a civil remedy through the sidewinds of a criminal trial than was s. 653(1) of the Criminal Code. Since the Court upheld s. 653(1) of the Code it would, logically, have to uphold a Canadian R.I.C.O. section 1964.

Finally, a provision establishing compulsory treble damages payable to the victim by the convicted offender would further highlight the fact that the civil remedies are essentially penalties (very harsh ones) directed at the offender and intended to punish him for his criminal activity. If the statute was intended to provide the victim with a remedy similar to that which he might receive in a civil case, one would expect to see the section drafted to take account of the victim's relationship with the offender and to compensate him for his actual loss. A compulsory treble damage section is clearly very different from that type of section. It takes no account of the victim's conduct and it substantially over-compensates him for his loss. It is directed very much against the offender as punishment for his illegal conduct.

In summary, a Canadian R.I.C.O. statute providing for civil remedies in a criminal sentencing context would be constitutionally sound. Such a section should be even safer than the compensation and restitution provisions of the Criminal Code upheld in Zelensky. In Zelensky the victim had to initiate the request for compensation, if successful the compensation was paid to him (i.e., he recovered), and his recovery matched his loss. In spite of these three victim-oriented facts the Court upheld compensation and restitution as a valid part of the sentencing process. If Canada adopted the American section 1964, none of these three victim-oriented facts would necessarily be present. A judicial order invoking one of the civil remedies would not be dependent on a request from the victim, some of the actual orders (such as dissolution and divestiture)

would not benefit the victim at all, and other orders (such as treble damages) would greatly over-compensate him. It is clear, therefore, that the R.I.C.O. civil remedies are not colorable; they are substantially offender-oriented (more so than in Zelensky) and valid as part of the sentencing process.

B. Civil Penalties/Remedies Divorced from Criminal Proceedings and Sentencing

Section 1964 of the United States R.I.C.O. law authorizes the Government or a private party (the victim) to initiate a civil suit against a person who has violated the offence-creating sections of the R.I.C.O. law. The civil suit can be launched without any reference to parallel criminal proceedings; indeed the existence of criminal proceedings is neither a condition precedent nor subsequent to the civil suit. A civil suit is attractive to the Government and victims because of some pre-trial advantages in discovery and production of documents available to plaintiffs in the civil process and because of the lower standard of proof (balance of probabilities) required to establish the offence. The civil route is also especially attractive to the victim because of the automatic treble damage remedy provision in section 1964.

In Canada a broad remedy along these lines would run into serious constitutional difficulties.¹ This is clearly a different category of fact situation than that posed by Zelensky. In Zelensky there were criminal proceedings, and ultimately a conviction, against the defendant. There were no separate civil proceedings and the civil remedies of

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1. A similar remedy is already contained in section 31.1 of the Federal Combines Investigation Act, Stats. Can. 1974-75-76, c. 76:

31.1(1) Any person who has suffered loss or damage as a result of
(a) conduct that is contrary to any provision of Part V...may,
in any court of competent jurisdiction, sue for and recover
from the person who engaged in the conduct...an amount equal
to the loss or damage proved to have been suffered by him...

This section is undoubtedly going to be the subject of much constitutional litigation, and ultimately a decision by the Supreme Court of Canada, in the next few years. Thus far only one judicial decision concerning this section has been made. In Rocois Construction Inc. v. Quebec Ready Mix Inc., Unreported judgment 4 December 1979, a trial judge of the Federal Court held that section 31.1 was unconstitutional.

compensation and restitution only came into play after a criminal conviction was entered. Accordingly the victim could allege (and the Court accepted) that a compensation order in favour of the victim was part of the criminal sentencing process. In the potential R.I.C.O. fact situation now under discussion the Government or victim would not be attempting to obtain civil remedies as part of a sentence in a criminal proceeding. There is no criminal proceeding. The Government or victim is clearly interested in a civil remedy. They will have to allege, therefore, that section 91(27) of the B.N.A. Act gives Parliament the power to confer a civil right of action for breach of a criminal law and that a civil court has the power to award a civil remedy in the absence of criminal proceedings being taken against the defendant. Against that factual background, can a Canadian R.I.C.O. section 1964 be sustained under section 91(27) of the B.N.A. Act?

The case law, including Zelensky, does not provide a definitive answer to this question. Indeed the case law seems to move in two different directions, although the validity of the first direction is now suspect.

The first strain of judicial decision stands for the proposition that Parliament does not have the capacity to confer a civil right of action for breach of a criminal law. The history and merits of this proposition have been fully discussed by Professors Hogg and Grover in their article "The Constitutionality of the Competition Bill", (1975-76) 1 Can. Bus. Law J. 197 at 208-209:

"The question whether the federal Parliament has the competence to confer a separate civil right of action for breach of a criminal statute has been the subject of conflicting judicial dicta. In two cases plaintiffs have sued for damages for breach of the anti-combines laws. In each case the plaintiff lost on the basis of statutory interpretation: the legislation was interpreted as not purporting to confer a civil right of action. In the first case there are obiter dicta in the Ontario Court of Appeal which suggest that the federal Parliament would in any case have no constitutional power to confer a civil right of

action for breach of a criminal statute (Transport Oil Ltd. v. Imperial Oil Ltd. and Cities Service Oil Co. Ltd., [1935] O.R. 215 at p. 219, [1935] 2 D.L.R. 500 per Middleton, J.A.). But in the second case the Supreme Court of Canada doubted the correctness of the Transport Oil dicta (Direct Lumber Co. Ltd. v. Western Plywood Co. Ltd., [1962] S.C.R. 646 at pp. 649-50, 35 D.L.R. (2d) 1 per Judson J.). Laskin, (Canadian Constitutional Law, 4th ed. (1973), at pp. 832-8) reports this difference and some related controversies, but does not take sides himself. McDonald, ("Constitutional Aspects of Canadian Anti-Combines Law Enforcement", supra, at p. 228) takes the view that the federal Parliament does have the power, as an incident to its criminal law power, to add a civil cause of action to a criminal statute. This is probably the better view, on the basis both of the weight of authority and upon the expansive approach of the courts to the criminal law power. We conclude, therefore, that the civil cause of action can probably be upheld as incidental to a valid criminal law."

Given that it is probably possible for Parliament to create a civil remedy as an incident of a valid criminal law, the question then becomes: is section 1964 an incident of the R.I.C.O. statute, which is clearly (excepting s. 1964) a valid criminal law? Or is section 1964 so far removed from the valid criminal law purposes of the statute as to sever the connection between it and section 91(27) of the B.N.A. Act? In attempting to answer these questions the second strain of judicial decision becomes relevant. Two recent Supreme Court of Canada decisions provide useful departure points for the analysis of this issue. They do not, however, provide final answers. The cases are MacDonald v. Vapour Canada Ltd., (1976) 66 D.L.R. (3d) 1, and Regina v. Zelensky.

In Vapour Canada section 53 of the federal Trade Mark Act provided for civil enforcement of the proscriptions of section 7 of the Act at the suit of persons injured by their breach. The Court, speaking through Chief Justice Laskin, had no difficulty dismissing the alleged criminal

law basis for these sections. There was nothing in either the offence (section 7) or the remedy (section 53) to tie these sections to any valid criminal purpose. Having decided this, the Chief Justice continued, in obiter, at p. 10:

"This Court's judgment in Goodyear Tire...upholding the validity of federal legislation authorizing the issue of prohibitory order in connection with a conviction of a combines offence, illustrates the preventive side of the federal criminal law power to make a conviction effective. It does not, in any way, give any encouragement to federal legislation which, in a situation unrelated to any criminal proceedings, would authorize independent civil proceedings for damages and an injunction."
(emphasis added)

In the second relevant case, Zelensky, it will be recalled that the nexus between a compensation order under section 653 of the Criminal Code and the criminal sentencing process was emphasized, Chief Justice Laskin's judgment in fact concluding that "s. 653 is valid as part of the sentencing process" (p. 709). Of course, the facts of the case did not present a wider issue of a civil remedy not tied to a criminal proceeding but, as he did in Vapour Canada, Laskin C.J. used language that casts doubt on the validity of such remedies. "It would be wrong," he said, "to relax in any way the requirement that the application for compensation be directly associated with the sentence imposed as the public reprobation of the offence." (p. 709; emphasis added)

It should be pointed out that Chief Justice Laskin is generally regarded as a judge who is, by and large, sympathetic to federal legislation. Therefore his clear statements in Vapour Canada and Zelensky to the effect that Parliament can create civil remedies only if they are tied closely to either criminal sentencing (Zelensky) or, slightly more broadly, to criminal proceedings (Vapour Canada) do not auger well for the constitutionality of the civil remedies in a Canada equivalent of section 1964 of the United States R.I.C.O. law. My conclusion is that the Supreme Court of Canada is likely to find a Canada section 1964

unconstitutional unless the remedies are used in a criminal sentencing context.

I would suggest, however, that such a probable conclusion is neither inevitable as a matter of logic nor necessarily desirable on the merits. I think that an argument in favour of the constitutionality of a Canadian section 1964 could be made on the following lines.

The essence of section 91(27) of the B.N.A. Act is that it supports federal legislation that is enacted for bona fide criminal purposes. Accordingly, when considering a penalty or remedy section in a federal statute the question should be: is this provision rationally related to a valid criminal purpose? The civil remedy in the Trade Mark Act is an easy case--there is nothing in the entire Act rationally related to a criminal purpose. The compensation and restitution sections of the Criminal Code are also, I suggest, an easy case--those sections are, at a minimum, rationally related to the punishment, deterrence and rehabilitation of offenders, which are clearly valid criminal purposes.

A Canadian R.I.C.O. section 1964, however, does not fit easily within either of the categories represented by Vapour Canada and Zelensky. Unlike the Trade Mark Act, a R.I.C.O. law is a valid criminal statute with a number of obvious penal sections. So it is impossible to dismiss section 1964 as a non-criminal section in a totally non-criminal statute as could be done, on the facts, in Vapour Canada. On the other hand, the potential criminal purposes underlying section 1964 are not similar to, or as easily identifiable as, the criminal purposes (namely, sentencing) upon which the compensation and restitution sections of the Criminal Code are founded. Section 1964 is not related to either the narrow criminal sentencing process (Zelensky) or the broader concept of criminal proceedings (Vapour Canada).

But, I would contend, the fact that section 1964 will be invoked in a situation unrelated to any criminal proceedings should not automatically

conclude its invalidity. Section 1964 is arguably related to another distinct criminal purpose, one as thoroughly legitimate as the punishment, deterrence and rehabilitation of criminal offenders. That criminal purpose is the prevention of crime which is firmly within federal competence under section 91(27) of the B.N.A. Act (see Laskin, Canadian Constitutional Law (4th ed., rev., 1975) at 815-826, and Hogg, Constitutional Law of Canada (1978) at 286-287).

Can section 1964 of a R.I.C.O. law be tied to the prevention of crime? Is it likely in fact to prevent crime? The answer to these questions is "yes--in some cases." A hypothetical can be used to support this answer.

Assume that the Canadian R.I.C.O. law defined "racketeering activity" to include arson, as the United States statute does. Assume that a Canadian businessman/racketeer was contemplating burning down several of his unprofitable businesses in order to collect insurance. He would then use the insurance money in other activities, either legal or illegal. This course of conduct would clearly be a violation of the R.I.C.O. law. What factors would enter his mind if section 1964 did not exist? Obviously the dominant factor would be an awareness that he would be subject to only the criminal process and criminal penalties and that this process would be initiated by the Government, specifically an Attorney General (note: it is unclear following the decision of the Supreme Court of Canada in Regina v. Hauser, (1979) 98 D.L.R. (3d) 193, which Attorney General could initiate the prosecution.) But what about this Attorney General(s)? What thoughts would the businessman/racketeer entertain concerning him as a potential antagonist? Clearly that prospect might have some restraining effect on our calculating potential offender. But that effect might be diluted somewhat, upon reflection, by recognition that:

(1) an Attorney General's inclination to prosecute might be dampened by constitutional uncertainties (which Attorney General has prosecutorial authority?);

(2) an Attorney General's inclination to prosecute might be dampened by a lack of knowledge concerning the complex operations of the offender or because of a lack of investigatory staff or because of the existence of an already heavy caseload or, if the businessman/racketeer is a powerful one, because a potential prosecution might be scuttled by political influences;

(3) if he is charged, the case against him will have to be established beyond reasonable doubt (the criminal standard);

(4) if he is convicted, some potential criminal penalties (fines, for example) might be insignificant when measured against the financial rewards he has already reaped by breaking the law.

Taking all of these factors into consideration, our calculating businessman/racketeer might decide that the advantages outweigh the risks. He goes ahead and burns down his businesses!

Now let us inject section 1964 into the consciousness of our calculating potential arsonist. Suddenly, he is faced with a second potential antagonist--the insurance company. And what are the characteristics of this antagonist? First, the insurance company, unlike the Attorney General, has a passionate personal interest in the offender and his activities. Secondly, the company is probably quite knowledgeable about those activities. Thirdly, if the fires will result in the company paying out huge amounts of money, the company will not likely be side-tracked by resource, workload and political considerations if it believes the fires were deliberately set. Fourthly, it is possible that the insurance company will have to establish a violation of the R.I.C.O. law on only the civil standard of balance of probabilities. (Arguably, because section 1964 would provide for a civil cause of action and civil remedy it does not require, or result in, a finding of guilt in the criminal sense; hence only the civil evidentiary standard will have to be met.) Fifthly, if the insurance company wins, it will recover treble damages, an amount that may be way beyond the ability of the businessman to pay. When all of these factors are injected into the mind of our potential law-breaker, is it not at least reasonable to project that they

will make him less inclined to commit the arson offence prohibited by the R.I.C.O. law?

The above scenario establishes, at least arguably, that there is a rational nexus between R.I.C.O. section 1964 and the valid criminal purpose of crime prevention which is an accepted component of Parliament's criminal law power. Hence section 1964 could be constitutional; it could be hoped that Chief Justice Laskin's dictum in Vapour Canada to the effect that the criminal law power does not support civil causes of action in situations unrelated to criminal proceedings will not become the Court's final position on this subject. "Criminal proceedings" and "criminal purposes" are not co-extensive. The former is a narrower concept; it is merely the traditional vehicle used by Parliament to give effect to laws enacted for criminal purposes. But it is not the only possible vehicle, as the scenario above illustrates. Accordingly, when considering section 1964 of a R.I.C.O. law, the Court should be open to the possibility of upholding it under section 91(27) of the B.N.A. Act because, although it will not be invoked in the context of criminal proceedings; it may have been enacted to give effect to a different, but equally valid criminal purpose--in this case, crime prevention.

Having said that, however, I would conclude this part of the Opinion by saying that I am not optimistic that the Supreme Court of Canada would accept the line of argument or conclusion just suggested. The dicta by Chief Justice Laskin in Zelensky and Vapour Canada are clear and recent. I would expect the Court to follow them and to hold that the remedies in section 1964 are unconstitutional unless they are used in a criminal sentencing context. Divorced from that context they probably constitute an invasion of provincial jurisdiction over civil rights within the province.

One final point should be made. If the remedies in section 1964 are beyond federal jurisdiction, it follows that the provinces could enact

legislation giving victims the right to sue offenders in civil proceedings for engaging in the kinds of activities proscribed by a federal R.I.C.O. law. Thus, although it might be more efficient to have a single law dealing with all penalties and remedies, the same result could be achieved by complementary federal and provincial legislation.

(6) Two minor questions arise out of the discussion of civil remedies in part (5) of this Opinion. Although they are both questions of procedure they could not be addressed until conclusions had been made concerning the constitutionality of the civil remedies in a R.I.C.O. law.

(a) Could a Canadian federal R.I.C.O. law provide for collateral estoppel as in section 1964(d) of the United States R.I.C.O. law?

(b) Could a Canadian federal R.I.C.O. law provide for a civil investigative demand as in section 1968 of the United States R.I.C.O. law?

(a) Section 1964(d) of the United States R.I.C.O. law provides:

A final judgment or decree rendered in favour of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offence in any subsequent civil proceeding brought by the United States.

If, as I concluded in part (5) of this Opinion, the civil remedies in section 1964 would be unconstitutional in Canada if divorced from a criminal sentencing context, then it would follow that the collateral estoppel provision would also be unconstitutional. If Parliament cannot legislate to provide substantive civil remedies, it also could not legislate concerning proceedings in a civil case.

The provincial legislatures, however, could provide civil remedies under section 92(13) of the B.N.A. Act. It would follow that they could also legislate concerning proceedings in a civil case. Therefore the provinces could enact a collateral estoppel provision similar to section 1964(b) of the American R.I.C.O. law.

(b) Parliament could legislate a civil investigative demand provision

similar to section 1968 of the American R.I.C.O. law provided that the actions done pursuant to that section were done in the context of a criminal trial. Such a provision, which presumably could be called a criminal investigative demand, would be valid as relating to "procedure in criminal matters", section 91(27) of the B.N.A. Act.

Obviously, a federal civil investigative demand section would not be constitutional in a pure civil case brought under section 1964 because, as discussed above, the remedies in that section are probably unconstitutional. The provinces, however, could provide for a civil investigative demand if they enacted a section 1964 equivalent.

SUMMARY

My conclusions are as follows:

(1) There is no constitutional difficulty in defining the phrase "unlawful debt" in a Canadian federal R.I.C.O. statute.

(Opinion, pp. 1-3)

(2) It would not be necessary in a Canadian Federal R.I.C.O. statute to restrict the definition of enterprise to corporations or individuals engaged in interprovincial or international commerce.

(Opinion, p. 4)

(3) Parliament could enact a reverse onus clause in a R.I.C.O. statute. (Opinion, pp. 5-7)

(4) A criminal forfeiture provision in a federal R.I.C.O. law would be constitutional (Opinion, pp. 7-13)

(5) Civil remedies in a federal R.I.C.O. law would be constitutional only if they were capable of being ordered as part of a criminal sentence. Divorced from this context, only the provincial legislatures could create civil remedies. (Opinion, pp. 13-24)

(6) A collateral estoppel provision in a federal R.I.C.O. law would be unconstitutional. The provincial legislatures could enact such a section. (Opinion, p. 24)

(7) A civil investigative demand section in a federal R.I.C.O. law would be constitutional only if its use was limited to criminal proceedings. Its use in civil proceedings could be legislated by provincial legislatures. (Opinion, pp. 24-25)

"JAMES C. MACPHERSON"

James C. MacPherson
Visiting Professor of Law
Osgoode Hall Law School
Toronto, Ontario

16 May 1980

APPENDIX D

SELECTED BIBLIOGRAPHY:

The following is a list of the major articles and books that were read in the preparation of this report. This list does not include legal case reports of any kind, informal and unpublished reports, or private communications, although extensive use was made of these as well.

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APPENDIX E

LIST OF AGENCIES/PEOPLE CONTACTED IN THE PREPARATION OF THE REPORT

Canadian Government Agencies:

Department of Justice (Ottawa and Montreal)
Office of Solicitor General (Ottawa)
Revenue Canada Taxation (Vancouver)
Law Reform Commission

Provincial Government Departments:

British Columbia, Ministry of Attorney General
British Columbia, Office of the Superintendent of Brokers
British Columbia, Liquor Administration Board
Alberta, Ministry of Attorney General
Manitoba, Ministry of Attorney General
New Brunswick, Ministry of Attorney General
Newfoundland, Ministry of Attorney General
Nova Scotia, Ministry of Attorney General
Ontario, Ministry of Attorney General
Prince Edward Island, Ministry of Attorney General
Quebec, Department of Justice
Saskatchewan, Ministry of Attorney General

Municipal Government Departments:

City of Vancouver, Department of Licenses and Permits
Montreal City Prosecutors

United States Government Departments:

Strike Force 18, U.S. Department of Justice, Washington, D.C.
U.S. Department of Justice, Cincinnati, Ohio
U.S. Drug Enforcement Administration (Blaine, Washington)
U.S. Customs and Excise (Blaine, Washington)
State of Florida, Office of the Attorney General
National Association of Attorneys General, Committee on the
Office of Attorney General

Other Government Departments:

Attorney General, London, England

Police Agencies Contacted:

Royal Canadian Mounted Police
- Headquarters, Ottawa, Ontario
- E Division, Districts 1 and 2

- Commercial Crime Section, Vancouver, B.C.
- Toronto detachment
- Hamilton detachment
- Criminal Intelligence Service Canada
- Criminal Intelligence Service British Columbia
- Criminal Intelligence Service Ontario
- Quebec Research Bureau on Organized Crime

Saanich Police Department, British Columbia

Vancouver City Police Department and Vancouver Integrated
Intelligence Unit

Ontario Provincial Police Department

Hamilton-Wentworth Regional Police Department

Metropolitan Toronto Police Department

Other Agencies:

Quebec Police Commission, Commission of Inquiry into Organized
Crime in Quebec

B.C. Police Commission

Canadian Association of Chiefs of Police

Cornell Institute on Organized Crime

Simon Fraser University, Vancouver, B.C., Dept. of Criminology

University of Toronto, Department of Criminology

University of Ottawa, Department of Criminology

Canadian Broadcasting Corporation

PROPOSALS FOR "MODEL ACT" TO BE ADOPTED BY PROVINCES

Because of its complexity, the researchers have not attempted to draft a "Model Act" incorporating civil provisions for adoption by the provinces. For discussion purposes however, the researchers have set out in note form what the "Model Act" should contain: (Part ____ refers to the part of the Criminal Code pertaining to corrupt organizations.)

1. A civil cause of action will lie where any person has been injured in his person, property or business by the actions of an individual who violates Part ____ of the Criminal Code.
2. It is not necessary that a defendant be convicted under Part ____ of the Criminal Code for a civil action to lie, but if the defendant has been previously convicted, he will be estopped from denying the essential elements of the criminal offence in any subsequent civil proceeding.
3. The Attorney-General of a province may sue under this Act to prevent and restrain violations of Part ____ of the Criminal Code, whether or not a conviction has been obtained under that Part.
4. Where a person sues under this Act and it is proven to the satisfaction of the court that a person has suffered damage as a result of the violation by the defendant of Part ____ of the Criminal Code, the court shall award triple damages plus costs.
5. Jurisdiction of the court to try actions under this Act will be determined by provincial rules of civil procedure.
6. Limitation periods will be determined by provincial rules of civil procedure.
7. A court may, upon application, postpone the running of a limitation period until the conclusion of criminal proceedings under Part ____ of the Criminal Code, where the defendant has been charged under that Part.



Province of
British Columbia

Ministry of
Attorney General

THE BUSINESS OF CRIME

**An Evaluation of the American
Racketeer Influenced and Corrupt Organizations
Statute from a Canadian Perspective**

**Executive Summary and
Draft Amendments to the *Criminal Code***

1. "Enterprise" Crime in Canada

Many, if not most, criminal offences committed in this country are essentially "street" crimes: they are spontaneous or poorly planned, violent, drug or alcohol related, and usually unsuccessful from a financial point of view. But, increasingly, we are experiencing another type of crime which is fundamentally different--the "enterprise" crime. Enterprise crimes are committed by sophisticated and rational individuals, usually acting in concert, and always for financial gain. Enterprise crimes are cleverly planned, well executed, and carry a high degree of success. The potential profits are huge. For example, it has been estimated that the average profit from a computer crime is in the area of half a million dollars.

Certain "industries" are particularly favoured by organized criminal groups who specialize in enterprise crimes. Police sources in Canada estimate that nearly \$1.5 million per day is spent in this country by heroin users to purchase that narcotic. Two recent seizures of marijuana on Vancouver Island produced drugs having a street value in excess of \$128 million. In the United States, authorities estimate that business losses due to commercial or "white collar" crimes amount to over 3 per cent of the gross national product. There is no reason to believe that the situation in this country is materially different; commercial crimes involving about \$70 million were investigated in the Province of British Columbia in 1979.

Having acquired wealth, organized criminal enterprises are quick to adopt the trappings of legitimate business in order to preserve and increase their profits. Good investments are assiduously sought out, and laundering operations of great volume and sophistication are initiated. One individual who has maintained historic ties with a reputed organized crime family has amassed various investments and real estate holdings valued at approximately \$7 million. Another, the subject of an investigation by the Quebec Crime Commission, was found to have had beneficial interests in at least 38 legitimate companies.

It is the thesis of this report that enterprise crime is fundamentally different from street crime. It is different in kind and effect, and it calls for different methods of investigation and prosecution.

2. The State of our Existing Criminal Law

Although criminal enterprises can and do amass huge profits from illegal activity, nothing in Canadian criminal law provides for the forfeiture of the profits of crime. An individual may be imprisoned for a lengthy period, but the profits of his criminal activity can be waiting for him upon his release. Indeed, in any case where some but not all of the members of a criminal gang are imprisoned, the profits will remain with the members who are still at large. This pool of working capital is available to help further future illegal enterprises.

Even where forfeiture powers are provided for in the existing law, they are riddled with loopholes. Under Section 10 of the Narcotic Control Act, for example, certain items are forfeitable but the police are not

necessarily entitled to retain a forfeitable item until after the trial. There have been instances where potentially forfeitable items have been given back to the accused persons pending trial. This could usually be expected to lead to a fast liquidation of the asset in question. Under Section 312 of the Criminal Code it is illegal to have any property or the proceeds of any property in one's "possession" if it was obtained directly or indirectly by crime. The emphasis in this section upon the concept of "possession" limits its usefulness; it is unlikely that it could apply, for instance, to the transfer of bank credit by electronic means in satisfaction of some illegal debt. Even if a conviction under Section 312 could be obtained, there is no provision for the forfeiture of the illicit profits.

Canadian criminal law appears inadequate in another way as well--in its almost exclusive preoccupation with individual or isolated transactions. This works well enough for street crimes, but enterprise crimes usually involve a series of transactions by a number of different people over a substantial period of time. The United States has overcome these deficiencies by enacting an innovative piece of legislation known as the Racketeer Influenced and Corrupt Organizations Statute ("R.I.C.O.").

3. The Racketeer Influenced and Corrupt Organizations Statute

The R.I.C.O. Statute grew out of the American assault on organized crime, which began with the Kefauver hearings in the 1950's and gained impetus through the efforts of Robert F. Kennedy as Attorney General in the 1960's. By 1970 numerous statutes had been enacted on a federal level in the United States which were designed specifically to attack organized crime. The R.I.C.O. Statute, while it was conceived in this setting, was aimed at a broader base. It had as its target the type of "enterprise" crimes we have been discussing, including (but not limited to) the traditional Mafia-style organized criminal group.

The R.I.C.O. Statute begins by creating four new criminal offences, which are:

- using or investing, directly or indirectly, any income or proceeds of income, derived directly or indirectly from a pattern of racketeering activity or collection of an unlawful debt to acquire an interest in, or to establish or operate, an enterprise; (Section 1962(a));
- acquiring an interest in, or control of, any enterprise through a pattern of racketeering activity or collection of an unlawful debt; (Section 1962(b));
- being employed by, or associated with, an enterprise and participating in the conduct of its affairs through a pattern of racketeering activity or collection of an unlawful debt; (Section 1962(c));
- conspiracy to do any of the above; (Section 1962(d)).

An offence under the R.I.C.O. Statute occurs only after at least two serious criminal offences have occurred which are so closely related to each other in time, place, and circumstances as to constitute a "pattern".

Moreover, the pattern of criminal activity (the Americans use the phrase "racketeering activity") must affect a business enterprise in some way. The term "enterprise" is defined widely to include not only "legitimate" businesses, but also informal organizations formed solely for illegal purposes. The offences cover the laundering of dirty money by investing it in a legitimate enterprise (Section 1962(a)), the taking over of a business by means of a pattern of criminal acts, and the participating in the conduct of the affairs of an enterprise in a persistently criminal manner. This last-mentioned type of offence falls under Section 1962(c) and is the most frequent type of R.I.C.O. prosecution in the United States.

In addition to the usual penalties (imprisonment and fines) the R.I.C.O. Statute provides for the forfeiture of two things:

- the profits of any crime which was the subject matter of the conviction; and
- any interest in an enterprise which was acquired or maintained in violation of the Statute.

The last-mentioned forfeiture provision ensures that the means of committing enterprise crimes, i.e. control of an illegal business or enterprise, can be removed from the hands of criminals after their conviction. In addition, the Statute makes provision for the issuance of restraining orders, which can be obtained by the prosecution at the outset of the case in order to prevent the accused persons from disposing of their assets prior to trial. Finally, the Statute provides for the institution of certain types of civil actions which are broadly analogous to actions brought under the antitrust provisions of American law.

4. Case Examples

Let us assume that the accused persons are carrying on a substantial business involving the importation and distribution of heroin. The profits from this enterprise have been laundered through an off-shore bank where strict bank secrecy laws prevail; accordingly, police investigators are not able to "trace" the money in the legal sense. When the money arrives back in Canada it is channelled into a company in which the accused persons own shares. This company uses the money to buy real estate. This prosecution would take place under Section 1962(a) of the R.I.C.O. Statute. At the outset, the prosecution would obtain restraining orders prohibiting the individuals from dealing in any way with their shares in the company and prohibiting the company itself from dealing in any way with the real estate it owns. The prosecution would have to begin by showing a pattern of criminal activity, i.e. two or more acts of heroin trafficking which are sufficiently similar to constitute a "pattern". The evidence would reveal the approximate amount of profit derived from trafficking during the time period in question, and it would reveal the acquisition of shares in the company by the individuals during the same time period. Moreover, evidence would be led of the individual pieces of real estate acquired by the corporation. At this point, under the American legislation, evidence would have to be led "tracing" the money from the criminal activity to the corporation. However, we have recommended a reverse onus provision which would give

rise to a presumption that the assets owned by the accused persons through the corporation were acquired with the profits of a pattern of criminal activity, and the burden of rebutting this presumption would shift to the accused. Upon conviction, the accused persons would be liable to the usual range of penalties provided for in the Criminal Code. In addition, each accused person's shares in the corporation would be forfeited to the Crown upon conviction.

An example of a prosecution under Section 1962(b) is provided by a case of a small businessman who becomes indebted to a loanshark. Let us assume that the owner of a small business, desperate for financing, has become increasingly indebted to a loanshark over a substantial period of time. Eventually, unable to repay the debt, the individual assigns his shares in the company owning the business to the loanshark. He does this only after violence or the threats of violence have thoroughly intimidated him. In this case, also, the prosecution would begin by obtaining a restraining order freezing the shares of the company in the hands of the loanshark and prohibiting the company from transferring any of its assets to other persons or jurisdictions. At trial, the prosecution would have to show that the violence and threats of violence perpetrated by the loanshark amounted to a pattern of criminal activity, and it was through that criminal activity that control of the business was obtained. Upon conviction, the accused person would be liable (in addition to a fine or imprisonment) to forfeit his shares in the business in question. The shares in this case would be returned to the victim.

Section 1962(c) is often used in the United States in cases of labour union corruption. A typical case would involve officials who accept bribes in exchange for the negotiation of "sweetheart contracts". Upon proof that the officials were employed by or associated with the union, and upon proof that they accepted bribes on several occasions in the course of conducting the affairs of the union, the accused persons could be convicted under Section 1962(c). They would be liable to forfeit their office in the union and to forfeit the proceeds of any bribes received. Section 1962(c) is also used as a broad type of conspiracy statute. The "enterprise" is defined as a group of persons associated in order to commit criminal acts. All criminal acts committed by the group can thereby be prosecuted in one trial and the interrelationship among the acts can be demonstrated.

5. Recommendations and Conclusions

We recommend that a statute similar in form and intent to the American R.I.C.O. Statute be enacted as part of the Canadian Criminal Code. A draft statute is attached. Some of the American terminology has been changed to make it more applicable to the Canadian setting (for example, the word "rack" and certain changes have been made to clarify ambiguities which are of concern to American courts. If a statute similar to R.I.C.O. is adopted in Canada, we must expect the courts to interpret it for provisions strictly as American courts have done with the R.I.C.O. Statute, as the British House of Lords has recently done with the forfeiture provisions of the 1971 Misuse of Drugs Act. We have particularly attempted, therefore, to avoid in our draft statute any ambiguity concerning property subject to forfeiture.

We recommend that the predicate offences upon which a R.I.C.O. prosecution could be based be, generally, those for which it is possible to obtain a wiretap authorization at present. These are the more serious offences which are traditionally associated with organized or enterprise crime.

American prosecutors have experienced difficulty in tracing the funds from illegal activity through the laundering process to its investment in a legitimate enterprise. We have recommended the onus provision to obviate this difficulty. We feel this provision is fair because it would take effect only after the Crown has been able to establish that the accused person was participating in a pattern of criminal activity and had acquired assets during such participation or within a brief period of time thereafter.

For constitutional reasons, not all of the American Statute can (in our opinion) be enacted on the federal level. Provisions providing for civil suits at the instance of an injured party, as well as suits initiated by the Attorney-General, would have to be enacted provincially if they are to be enacted at all. We recommend that the Province of British Columbia enact such legislation, and Appendix "F" to the report details the provisions that should be included in provincial legislation of this type.

DRAFT AMENDMENTS TO THE CRIMINAL CODE: A PROPOSAL

NOTE: These amendments are for illustration purposes only. They have not been professionally drafted. They do not include changes to Criminal Rules of Procedure that will be necessitated by the implementation of forfeiture provisions and other unusual provisions contained in the amendments.

PART : CRIMINAL ENTERPRISES

Definitions

1. In this Part,

"Attorney General" means the Attorney General or Solicitor General of a province in which proceedings to which this Part applies are taken and, with respect to the Northwest Territories and the Yukon Territory, means the Attorney General of Canada, and includes the lawful Deputy of the said Attorney General, Solicitor General and Attorney General of Canada;

"criminal activity" means an offence contrary to, any conspiracy or attempt to commit or being an accessory after the fact in relation to an offence contrary to, or any counselling, procuring or inciting in relation to an offence contrary to section 58 (forgery, etc.), 88 (possession of prohibited weapon), 108 (bribery, etc.), 109 (bribery, etc.), 110 (fraud upon government), 111 (breach of trust), 112 (municipal corruption), 121 (perjury), 127 (obstructing justice), subsection 185(1) (keeping gaming or betting house), paragraph 159(1)(a) (pornographic materials), section 186 (betting, pool-selling, bookmaking, etc.), 195 (procuring), 218 (murder), subsection 245(2) (assault causing bodily harm), section 247 (kidnapping), paragraph 294(a) (theft in excess of \$200.00, etc.), section 303 (robbery), 305 (extortion), 305.1 (criminal interest rate), 306 (breaking and entering), 312 (possession of property obtained by crime), 314 (theft from mail), 325 (forgery), 326 (uttering forged document), 331 (threatening letters and telephone calls), 338 (fraud on public, etc.), 339 (using mails to defraud), 340 (fraudulent manipulation of stock exchange transactions), 383 (secret commissions), 389 (arson), 407 (making counterfeit money), 408 (possession, etc., of counterfeit money),

410 (uttering, etc., of counterfeit money), section 4 (trafficking) or 5 (importing or exporting) of the Narcotic Control Act, section 34 or 42 (trafficking) of the Food and Drugs Act, section 192 (smuggling) of the Customs Act, section 158 or 163 (unlawful distillation or selling of spirits) of the Excise Act, section 169 (fraudulent bankruptcy) of the Bankruptcy Act;

NOTE: This definition is based upon the definition of "offence" found in S. 178.1 of the Criminal Code which lists those offences for which a wiretap authorization may be obtained. The only offence we have added to the list found in S. 178.1 is the offence of loansharking (contrary to S. 305.1). On the other hand, the following offences found in S. 178.1 have not been reproduced in our definition of "criminal activity":

- high treason
- intimidating Parliament or a Legislature
- sabotage
- sedition
- hijacking
- endangering aircraft, etc.
- offensive weapons, etc., on aircraft
- breach of duty (S. 78)
- causing injury with intent (S. 79)
- possessing explosives
- prison breach
- rape
- unlawful interception (S. 178.11)
- possession of intercepting device (S. 178.18)
- advocating genocide
- escape, etc. (S. 133(1))
- S. 3 or S. 20 of Small Loans Act

We have included in the definition of "criminal activity" all of S. 186 (dealing with betting, pool-selling, bookmaking, etc.) although only S. 186(1)(e) is mentioned in the wiretap legislation.

Consideration should also be given to incorporating major offences from the Combines Investigation Act.

"enterprise" includes any partnership, corporation, association or other legal entity, any federal, provincial or municipal government or agency, any public department, any union or group of individuals associated in fact although not a legal entity, and, without restricting the generality of the foregoing, includes a

corporation incorporated under the laws of any country or province, and includes any such relationship formed for an unlawful or lawful purpose;

"pattern of criminal activity" requires at least two acts of criminal activity that have the same or similar intents, results, accomplices, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated incidents.

NOTE: See S. 10 herein.

Offences

2. Every one who

(a) being employed by or associated with any enterprise, conducts or participates, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of criminal activity;

(b) acquires or maintains, directly or indirectly, through a pattern of criminal activity, any interest in, or control of, any enterprise;

(c) uses or invests, directly or indirectly, any income derived directly or indirectly from a pattern of criminal activity, or any part of such income, or the proceeds of such income, in the acquisition of any interest in, or the establishment or operation of, any enterprise; or

(d) conspires with any one to do anything mentioned in paragraphs (a), (b) or (c)
is guilty of an indictable offence.

Penalty

3. Every one who commits an offence under section 2

(a) is liable to imprisonment for life, and

(b) in addition to any other sentence that may be imposed, shall forfeit to Her Majesty

(i) anything, whether real or personal, tangible or intangible, that has been acquired or maintained through the commission of an offence under this Part; and

(ii) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, acquired, operated, controlled, conducted,

or participated in the conduct of, in violation of this Part.

NOTE: See S. 651(1) of the Criminal Code regarding disposal of the forfeited property.

The definition of "sentence" in S. 601 of the Criminal Code should be amended to permit an appeal to the Court of Appeal from an order of forfeiture.

Orders of Divestiture, etc.

- 4(1) A court that convicts an accused of an offence under this Part may, at the time sentence is imposed, for the purpose of preventing further violations of this Part, order that
- (a) an accused divest himself of any interest, direct or indirect, in any enterprise;
 - (b) the enterprise which was the subject of the conviction be dissolved or reorganized;
 - (c) an accused be prohibited from engaging in the type of endeavour engaged in by the enterprise which was the subject of the conviction;
 - (d) an accused comply with such other reasonable conditions as the court considers desirable for securing the good conduct of the accused and for preventing a repetition by him of the same offence or the commission of other offences.
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NOTE: (d) follows the wording of S. 663(2)(h) regarding probation orders.

- (2) A judge that convicts an accused of an offence under this Part may, at the time sentence is imposed, upon application by any person injured in his business, person, or property, order the accused to pay to that person an amount equal to three times the amount of damage suffered by the applicant as a result of the commission of the offence of which the accused is convicted.
- (3) The applicant or the Attorney General may appeal to the Court of Appeal from an order made under subsection (1) or (2).
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NOTE: Subsection (2) is based upon S. 653(1) of the Criminal Code.

Onus Reversed

5. In proceedings under paragraph 2(c), where it is established that an accused participated in a pattern of criminal activity and that the accused acquired an interest in, or established or operated, an enterprise at the time when he was participating in the pattern of criminal activity, or within 90 days after the pattern of criminal activity has terminated, it shall be presumed that income derived from the pattern of criminal activity has been used or invested in the acquisition of the interest in, or the establishment or operation of, the enterprise in question, unless the accused establishes that such income, or the proceeds of such income, was not so used or invested.

Interim Orders and Recognizances

- 6(1) Upon application made ex parte by the prosecution, a court of criminal jurisdiction or any judge thereof may order that no person shall alienate, encumber, diminish, or deal in any manner with anything which may be subject to forfeiture under this Part.

NOTE: See the definition of "court of criminal jurisdiction" in section 2 of the Criminal Code.

- (2) A judge who makes an Order pursuant to subsection (1) may, at any time prior to trial, upon application by the prosecution or the accused, review his Order and alter it in such manner as the circumstances may require.
- (3) A judge who hears an application under subsection (1) or subsection (2) may also order that an accused shall enter into a recognizance, with or without sureties, with or without deposit of money or valuable security, and upon such conditions as may seem just in the circumstances, to ensure that anything which may be subject to forfeiture under this Part shall not be alienated, encumbered, diminished, or dealt with in any way prior to the conclusion of proceedings under this Part.

Forfeiture

- 7(1) No order of forfeiture pursuant to S. 3 shall be made unless the prosecution establishes that the accused has

been given reasonable notice in writing that such an order would be sought.

- (2) Where it is established that anything, whether real or personal, tangible or intangible, was acquired by an accused at a time when he was participating in a pattern of criminal activity, or within 90 days after the pattern of criminal activity has terminated, the thing in question shall be presumed (for the purposes of forfeiture under S. 3) to have been acquired with the proceeds of the said criminal activity unless the accused establishes that it was not so acquired.
- (3) If any interest or property right is not exercisable by or transferrable to Her Majesty, an order of forfeiture pursuant to S. 3 may nevertheless be made and the right or interest in question shall expire and shall not revert to the convicted person.
- (4) Anything or any interest forfeited under this Part shall be disposed of as the Attorney General directs, making due provision for the rights of innocent persons.

Application by Person claiming Interest

- 8(1) Where anything is forfeited to Her Majesty under S. 3, any person (other than a person convicted of the offence that resulted in the forfeiture) who claims an interest therein may, within 30 days after such order of forfeiture, apply by notice in writing for an order under subsection (4).
- (2) The applicant shall serve a notice of the application upon the Attorney General within 30 days after the order of forfeiture.
- (3) An application under subsection (1) shall be made to the judge who made the order of forfeiture, and he shall fix a date not less than 45 days after the date of the order of forfeiture for the hearing of the application.
- (4) Where, upon the hearing of an application, it is made to appear to the satisfaction of the judge,
 - (a) that the applicant is innocent of any complicity in the offence that resulted in the forfeiture and of any collusion in relation to that offence with the person who was convicted thereof, and
 - (b) that the applicant has a bona fide interest in the subject matter of the forfeiture,

the applicant is entitled to an order declaring that his interest is not affected by such forfeiture and declaring the nature and extent of his interest, or to an order that he be reimbursed by the Attorney General in an amount equal to the value of his interest.

- (5) The applicant or the Attorney General may appeal to the Court of Appeal from an order made under subsection (4).

NOTE: This section is based upon S. 11 of the Narcotic Control Act R.S.C. 1970, C. N-1.

Consent of Attorney General

9. No proceedings shall be commenced under this Part without the consent of the Attorney General.

Transitional

10. Offences which were committed prior to the date of proclamation of this Part may form part of the pattern of criminal activity in a prosecution for an offence under this Part, provided that at least one such offence was committed subsequent to the said proclamation.

A.G.H.

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